Supreme Court, U.S.
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No. 021792

In The

Supreme Court of the United States

CARL E. JONES, KATHRYN L. JONES,
LARRY TREADWAY, KASSIE TREADWAY,
DAVID C. JONES, SYLVIA J. JONES,
JERRY PURCELL, MARGIE PURCELL,

Petitioners,

v.

BUFFALO TOWNSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. TO QUALIFY FOR AN INTERIM TRAIL USE UNDER THE NATIONAL TRAILS SYSTEMS ACT, 16 U.S.C. § 1247(d), SUSPENDING ABANDONMENT OF A RAILROAD RIGHT OF WAY AND STOPPING REVERSION OR EXTINGUISHMENT OF THE RIGHT OF WAY EASEMENT, IS IT NECESSARY TO COMPLY WITH THE RULES AND REGULATIONS SET FORTH IN 49 C.F.R. § 1152.29? OR IS IT SUFFICIENT NOT TO FILE THE REQUIRED APPLICATION, NOT TO APPEAR BEFORE THE ICC, NOT TO PARTICIPATE IN HEARINGS, BUT TO UNILATERALLY PLEDGE TO CARRY OUT THE OBJECTIVES AND THE INTENT OF THE NATIONAL TRAILS SYSTEMS ACT?

2. WHERE THERE IS NO PRECEDENT ON THE INTERPRETATION AND APPLICATION, OF A FEDERAL STATUTE AND REGULATIONS BETWEEN A STATE'S SUPREME COURT DECISION AND ITS JUDGMENT ON REQUEST FOR REARGUMENT, AND THE COURT OF APPEALS FOR THAT CIRCUIT ENTERS A JUDGMENT WITH A CONTRA OPINION AND INTERPRETATION OF THE SAME FEDERAL STATUTES AND REGULATIONS AND THERE IS FILED WITH THE STATE COURT THE OPINION OF THE FEDERAL CIRCUIT COURT TO DIRECT THE STATE COURT'S ATTENTION TO THIS CONFLICT THIRTY DAYS BEFORE THE FINAL STATE ORDER, IS THE STATE COURT ORDER IN VIOLATION OF THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, ARTICLE VI, CLAUSE 2, AND INVALID?

QUESTIONS PRESENTED – Continued

3. IN OBTAINING OR APPLYING FOR AN INTERIM TRAIL USE TO THE ICC OR STB, IS IT NECESSARY TO COMPLY WITH THE JURISDICTIONAL TIME LIMITS ESTABLISHED FOR TAKING ACTION ON THE APPLICATION?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners respectfully request that a Writ of Certiorari be issued to review the Judgment and Opinion and findings of fact of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is reported at 813 A.2d 659. The Order of the Pennsylvania Supreme Court denying Rehearing is not reported, other than in the notes of the A.2d reporter. The Opinion of the Court of Appeals for the Third Circuit is reported at 319 F.2d 595. The Opinion of the Commonwealth Court of Pennsylvania is reported at 778 A.2d 1269. The Opinion of the Court of Common Pleas of Butler County is not reported.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment on Reargument denied March 11, 2003. 813 A.2d 659 (App. infra, 57a)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748(c), provides that Conrail may abandon an unprofitable right of way by filing a notice of insufficient revenues, wait at least 90 days then file an application for abandonment. 45 U.S.C. § 748(c). The express language requires the ICC to grant the application unless an offer of financial assistance has been received, and the ICC recognized that it may delay abandonment under the interim trail provisions of the National Trails Systems Act, 16 U.S.C. § 1247(d), administered under 49 C.F.R. § 1152.29.

The National Trails Systems Act, was amended to provide in Section 8(d), 16 U.S.C.A. § 1247(d), that the Interstate Commerce Commission [now Surface Transportation Board], "in administering the Railroad Revitalization and Regulatory Reform Act of 1976," 45 U.S.C.A. §§ 801, et seq., authorizes the establishment of "trails ***using* the provisions of such programs**." 16 U.S.C.A. § 1247(d) (Emphasis supplied.)

The Act further provided that:

> "in the case of interim use [for trial purposes] of any established railroad-right-of-way . . . such interim use shall not be treated, for the purpose of any law or rule of law, as an abandonment of such rights of way for railroad purposes."

The Code of Federal Regulations 49 C.F.R. § 1152.29, governing the creation of "interim trail use and railbanking" provides as follows:

"§ 1152.29 **Prospective use of rights of way for interim trail use and railbanking**.

"(a) **If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and railbanking pursuant to 16 U.S.C. § 1247(d), it *must* file a comment or otherwise include a request in its filing (*in a regulated abandonment proceeding*) or a petition (in an exemption proceeding) indicating it would like to do so**. . . . .

"(b)(1)

"(i.) **In every proceeding where a Trails Act request is made, *the Board will determine whether the Trails Act is applicable***. 49 C.F.R. § 1152.29 (Emphasis supplied)

The supremacy clause of the U.S. Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all of the Treaties made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Art. VI, cl.2, Constitution of the United States.

STATEMENT OF THE CASE

In the 1860s the Western Pennsylvania Railroad Company under the power of eminent domain obtained a railroad right of way easement across properties, now owned by the Petitioners. The Butler Branch ultimately came under the ownership of Conrail, which later applied

to the ICC for authority to abandon the line under the Railroad Revitalization and Regulatory Reform Act. The ICC issued an abandonment order and no interim trail use permit was issued. The rails were sold and removed. The abandonment has been consummated, and the railroad right of way has been extinguished. The National Trails Systems Act has not been complied with, and the extension of the easement not effectuated. It is necessary to comply with 49 C.F.R. § 1152.29 to gain the benefits, through an administrative process.

The United States Court of Appeals for the Third Circuit has held that it is necessary to comply with 49 C.F.R. § 1152.29 for an interim trial use to be authorized. This is binding on the State Courts in Pennsylvania under the Supremacy Clause.

The Pennsylvania Rail to Trail Act, and the National Trails Systems Act were not complied with and cannot be used as a factual basis for a finding of fact in an Equity case, as stated in each of the Pennsylvania cases opinions, so no Court may be bound by the trial court's determination of fact that there was no intent to abandon.

The issue of the need to comply with 49 C.F.R. § 1152.29 was preserved in each opinion in the State Courts.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT OF PENNSYLVANIA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL AND STATE LAW IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT, THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND OTHER COURTS OF APPEALS, AND VIOLATED THE SUPREMACY CLAUSE OF THE CONSTITUTION.

II. THE SUPREME COURT OF PENNSYLVANIA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

III. THE SUPREME COURT OF PENNSYLVANIA HAS MISCONSTRUED, MISINTERPRETED, AND MISAPPLIED THE NATIONAL TRAILS SYSTEMS ACT AND THE RULES AND REGULATIONS ISSUED THEREUNDER TO AUTHORIZE THE CREATION OF TRAILS WITHOUT COMPLIANCE WITH THE ACT AND THE RULES.

IV. THE SUPREME COURT OF PENNSYLVANIA HAS VIOLATED THE SUPREMACY CLAUSE IN INTERPRETING THE NATIONAL TRAILS SYSTEMS ACT AND DISREGARDING THE RULES AND REGULATIONS ESTABLISHED IN RELATION THERETO.

V. THE SUPREME COURT OF PENNSYLVANIA HAS OMITTED, OR MISSTATED IN THE OPINION, A MATERIAL FACT WHICH CONTRIBUTED TO THE FINDINGS OF THE LOWER COURT IN ITS FINDING OF FACT AND OPINION.

CONCLUSION

This Honorable Court should hold that the provisions of the National Trails Systems Act 16 U.S.C. § 1247(d), extending the expiration of rights of ways under Interim Trail Use, may only be actuated in compliance with 49 C.F.R. § 1152.29.

Further, that in the present cases before this Court, the easements of right of ways have been extinguished.

Respectfully submitted,

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[J-24-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BUFFALO TOWNSHIP, Appellee v. CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL AND MARGIE PURCELL, Appellants	:	No. 86 WAP 2001 Appeal from the Order of the Commonwealth Court entered June 14, 2001, at No. 1875CD2000, affirming the Order of the Court of Common Pleas of Butler County, Civil Division, entered July 31, 2000, at No. 00-50009. 778 A.2d 1269 (Pa. Commw. 2001) ARGUED: March 6, 2002

OPINION

MR. JUSTICE CAPPY

DECIDED: DECEMBER 31, 2002

In this appeal, we consider whether the trial court properly granted a permanent injunction in favor of Appellee, Buffalo Township, prohibiting Appellants from interfering with Buffalo Township's recreational trail along a 20.7-mile right-of-way formerly known as the Butler Branch of the railroad that was operated by the Consolidated Rail Corporation (hereafter "Conrail"). The Commonwealth Court affirmed the trial court's order. For the reasons stated herein, we affirm the lower courts' grant of the permanent injunction in favor of Buffalo Township.

In the late 1860's, the Western Pennsylvania Railroad Company (which subsequently became part of Conrail) constructed a branch line known as the Butler Branch that ran between Freeport, Armstrong County and Butler, Butler County. During construction, the railroad obtained rights-of-way and easements over privately owned property through condemnation proceedings and right-of-way agreements.

On October 31, 1985, Conrail notified the Interstate Commerce Commission[1] (hereafter "ICC") of its intent to file an application to abandon the Butler Branch due to insufficient revenue. On June 8, 1987, Conrail filed a request for approval of abandonment of the Butler Branch with the ICC. On September 14, 1987, the ICC issued a certificate and decision authorizing Conrail to abandon the Butler Branch.

In the early spring of 1990, B. Sykes Limited (hereafter "B. Sykes"), a salvage company, purchased the rails and ties along the right-of-way from Conrail and removed these rails and ties. Conrail and Buffalo Township also filed a request for interim trail use pursuant to 49 C.F.R. § 1152.29(a) with the ICC. However, they withdrew this petition on September 12, 1990, after the ICC informed Conrail and Buffalo Township that it needed further information on whether Conrail had consummated abandonment of the subject property. On June 11, 1991, Conrail

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[1] The Surface Transportation Board ("STB") assumed all of the functions of the ICC as of January 1, 1996. 49 U.S.C. § 702. Throughout this opinion and for ease of reference, we refer to the agency as the ICC since at the time of the transfer of the property the STB was still known as the ICC.

conveyed by quitclaim deed all of its rights, title and interest in the property to B. Sykes.[2] In turn, on June 14, 1991, B. Sykes conveyed its interest to Buffalo Township by quitclaim deed. Conrail reserved the right to reenter the land in both of the deeds. *See* Plaintiff's Exhibits 1 & 2.

In 1992, Buffalo Township began to develop the former railroad property as a recreational trail pursuant to the Pennsylvania Rails to Trails Act (hereafter "State Act"), 32 P.S. § 5611 et seq. and the National Trails System Act (hereafter "National Act"), 16 U.S.C. § 1241 et seq. Shortly thereafter, certain property owners along the right-of-way, Appellants herein, erected barriers to prevent passage on the newly developed trails asserting that Conrail had abandoned the right-of-way and thus, the right-of-way reverted to them. Buffalo Township then filed a complaint in equity in the Court of Common Pleas of Butler County and simultaneously filed a preliminary injunction seeking to enjoin Appellants from erecting barriers on its land.

On May 5, 2000, the trial court granted the preliminary injunction, preventing Appellants "from blocking, obstructing, threatening, intimidating, or coercing agents and employees of the Township of Buffalo or individuals using the Butler-Freeport Community Trail . . . ." Memorandum Opinion and Order of Court dated July 31, 2000. On July 31, 2000, the trial court entered a final or permanent

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[2] Appellants do not raise any challenge based upon the intermediate transfer from Conrail to B. Sykes. Thus, the effect of that intermediate transfer on the ultimate question of Buffalo Township's present property interest is not before this court.

injunction[3] preventing Appellants from denying access to the trail in any manner. The trial court filed an opinion in support of its order. The court explained that Appellees demonstrated a clear right to relief, since Conrail did not abandon the railway. Further, under the National Act, a conversion of property from a railroad to trail use did not constitute abandonment. Accordingly, Buffalo Township properly acquired Conrail's interest in the property.

On appeal, the Commonwealth Court affirmed. *Buffalo Township v. Jones et al.*, 778 A.2d 1269 (Pa. Commw. 2001). The court deferred to the trial court's determination that Conrail had not abandoned the right-of-way, concluding that Appellants could not meet their burden of demonstrating that the lower court abused its discretion. Additionally, the court held that Buffalo Township was not required to obtain ICC approval for the interim trail use so long as it in fact complied with the requirements of the National Act. Accordingly, the Commonwealth Court determined that the trial court's order granting "injunctive relief enjoining Property Owners from interfering with the public's use of the trail was appropriate." *Id.* at 1277.

This court granted allowance of appeal to consider whether the trial court properly granted a permanent injunction to Buffalo Township.

Appellants argue that Conrail abandoned the right-of-way prior to the transfer of the property to Buffalo Township via a quitclaim deed. According to Appellants, Conrail

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[3] Courts refer to the injunction as either final or permanent.

abandoned the property either when it filed a certificate of abandonment with the ICC or when it authorized salvage of the railroad tracks. Thus, Conrail had abandoned its interest in the property prior to the time it transferred its "interest". Alternatively, upon transfer of the property, Conrail abandoned the property since its interest in the property was limited solely to railroad purposes. Further, Appellants maintain that the lower courts improperly relied upon the National Act in determining that the property was not abandoned, since Conrail and Buffalo Township did not comply with the requirements of the National Act, and thus, that Act cannot preserve the transfer of the property to Buffalo Township. Accordingly, Appellants conclude that the property reverted to them under common law and the lower courts erred in granting the injunction in favor of Buffalo Township. Finally, Appellants assert that even if the property was not abandoned, the lower courts improperly granted the injunction, since Buffalo Township did not establish either a need for immediate relief or irreparable harm. Additionally, Appellants conclude that the trial court erred in failing to refer the abandonment issue to a jury.

Buffalo Township responds that the land was not abandoned at the time of the quitclaim deed, thus Conrail properly transferred its interest in the property. Further, the National Act and the State Act allows the transfer of the property. Alternatively, Buffalo Township offers that case law from Pennsylvania allows a railroad company to transfer the land to further a public use or purpose. In this case, the transfer served such purpose and thus, the property did not revert to the underlying landowners.

Initially, we note that in order to establish a claim for a permanent injunction, the party must establish his or

her clear right to relief. *See Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc.*, 676 A.2d 695, 699 (Pa. Commw. 1996). However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court "may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." *Soja v. Factoryville Sportsmen's Club,* 522 A.2d 1129, 1131 (Pa. Super. 1987). Additionally, when reviewing the grant or denial of a final or permanent injunction, an appellate court's review is limited to determining whether the trial court committed an error of law.[4]

In order to address Appellants' claims in this matter, we must first consider the nature of the property interest

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[4] The intermediate courts have expressed that the standard of review for the grant or denial of a permanent injunction is whether the trial court abused its discretion or committed an error of law. *See Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc.*, 676 A.2d 695, 699 (Pa. Commw. 1996); *Licensed Beverage Ass'n. of Philadelphia v. Bd. of Educ. of the School District of Philadelphia,* 669 A.2d 447, 449 n.3 (Pa. Commw. 1995). These courts have imported this standard of review from reviewing the grant or denial of a preliminary injunction. However, as noted above, the test for the issuance of the two types of injunctions is not the same. While we do not question the standard as it relates to preliminary injunctions, we do not agree that this standard is appropriate for permanent injunctions. Ultimately, the grant or denial of a permanent injunction will turn on whether the lower court properly found that the party seeking the injunction established a clear right to relief as a matter of law. This inquiry involves a legal determination by the lower court. Accordingly, we think it proper that appellate review in these cases is whether the lower court committed an error of law in granting or denying the permanent injunction. Our standard of review for a question of law is de novo. *Seven Springs Farm, Inc. v. Croker,* 801 A.2d 1212, 1216 n.1 (Pa. 2002). Our scope of review is plenary. *See ODC v. Jepsen,* 787 A.2d 420 (Pa. 2002).

of the parties and whether Conrail abandoned its property interest under state law.[5] The common law provided that the property interest reverted to the grantor or the grantor's successors upon abandonment of a railroad right-of-way. *See Brookbank v. Benedum-Trees Oil Co.*, 131 A.2d 103, 112 (Pa. 1957); *Quarry Office v. Philadelphia Electric Co.*, 576 A.2d 358, 363 (Pa. Super. 1990). "[A]n estate in reversion is the residue of an estate left to the grantor, to commence in possession after the determination [6] of some particular estate granted out by him." *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 234 (Pa. 1943) (citing Blackstone, Vol. 2. § 176). A reversionary interest is used to define the interest that a person has in the reversion of property. *See* BLACK'S LAW DICTIONARY 1186 (5th Edition 1979). It is the right to "the future enjoyment of property, at present in the possession or occupation of another." *Id.* Thus, upon the determination of the railroad's estate, i.e., abandonment of

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[5] Both parties cite federal law in support of their positions. However, our inquiry is directed at whether Conrail's property interest in the right-of-way reverted to Appellants. "State law generally governs the disposition of the reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments, and to impose conditions affecting postabandondment use of the property." *Preseault v. ICC et al.*, 494 U.S. 1, 8 (1990); *see e.g. Chatham v. Blount County*, 789 So.2d 235, 241 (Ala. 2001). In other words, the ICC has jurisdiction to make determinations regarding abandonment of the railroad line and conditions placed upon such abandonment and thus, such decisions are subject to federal law. However, state law controls the disposition of the underlying property interest. *See* Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?* 26 COLUMBIA J. ENVTL. L. 399, 446-47 (2001).

[6] Determination is defined as "[t]he ending or expiration of an estate or interest in property." BLACK'S LAW DICTIONARY 405 (5th Edition 1979).

the right-of-way by the railroad, the property would "revert" to the landowner.

In evaluating whether the user abandoned the property, the court must consider whether there was an intention to abandon the property interest, together with external acts by which such intention is carried into effect. *Lawson v. Simonsen,* 417 A.2d 155, 160 (Pa. 1980); *see also Burnier v. Dep't of Envtl. Resources,* 611 A.2d 1366, 1368 (Pa. Commw. 1992). In order to establish the abandonment of a right-of-way, the evidence must show that the easement holder intended to give up its right to use the easement permanently. *Thompson v. R.R. Preservation Society,* 612 A.2d 450, 453 (Pa. Commw. 1992). "Such conduct must consist of some *affirmative act* on his part which renders use of the easement impossible, or of some *physical obstruction* of it by him in a manner that is inconsistent with its further enjoyment." *Id.* (emphasis in original); *see also Piper v. Mowris,* 351 A.2d 635, 640 (Pa. 1976). Mere nonuse by the railroad does not amount to abandonment. *Lawson,* 417 A.2d at 160; *see also Burnier, supra.*

In determining the intent of the parties, the intermediate courts have considered a myriad of factors. For example, in *Birdsboro Municipal Auth. v. Reading Co. and Wilmington & Northern R.R.,* 758 A.2d 222, 227 (Pa.Super. 2000), the court held that a mere failure to maintain and repair existing tracks did not amount to an intent to abandon. In *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.,* 612 A.2d 450, 454 (Pa.Super. 1992), the court held that evidence that the railroad company entered into salvage agreements and quitclaimed its interest in the subject property should be submitted for the factfinder to resolve the railroad's intent to abandon. Courts in this Commonwealth have also indicated that the

filing of a certificate of abandonment with the ICC or PUC demonstrated intent to abandon, but cautioned that in order to justify a finding of abandonment, the filing of the certificate must be coupled with external acts in furtherance of abandonment. *Chew v. Commonwealth,* 161 A.2d 621, 624 (Pa. 1960); *Lacy v. East Broad Top Railroad & Coal Co.,* 77 A.2d 706, 710 (Pa. Super. 1951); *see also Thompson, supra.*

In sum, many different factors can be considered when making a determination of abandonment. Moreover, no single factor alone is sufficient to establish the intent to abandon. Abandonment must be determined based upon all of the circumstances surrounding the alleged abandonment.

Turning to the instant case, we must consider whether the trial court's decision that Conrail did not abandon its property interest in the subject property was reasonable.[7] In ascertaining Conrail's intent, the trial court examined all the circumstances surrounding the alleged abandonment. In this case, Conrail took certain action that suggested an intention to abandon the railroad line, such as

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[7] The parties do not dispute the equity court's findings of facts. Rather, Appellants argue that those facts, taken in their entirety, amount to abandonment. Questions of abandonment are heavily fact-driven decisions. *Lawson,* 417 A.2d at 159-60; *Thompson,* 612 A.2d at 453. In reviewing fact-laden decisions, an appellate court displays a high level of deference to the trial court as the fact finder. *See, e.g.,* Martha Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking,* 2 J. APP. PRAC. & PROCESS 47 (Winter 2000). Accordingly, our standard of review regarding an issue of abandonment is whether "a judicial mind, on due consideration of all the evidence, as a whole, could reasonably have reached the conclusion of that tribunal." *Aiken Indus., Inc. v. Estate of Wilson,* 383 A.2d 808, 810 (Pa. 1978).

filing a request to abandon rail service with the ICC and entering into an agreement with B. Sykes for salvage of the rails. However, Conrail took other steps evidencing the contrary intent, such as participating in ongoing negotiations with Buffalo Township for the use of the land and expressly retaining the right to reenter the land for future railroad use in the deed. Ultimately, the trial court was persuaded by these latter factors and concluded that Conrail did not abandon the right-of-way. In fact, these latter factors demonstrated Conrail's intent to *retain* an interest in the right-of-way. Accordingly, on due consideration of all of the evidence, we find that the equity court reasonably concluded that Conrail did not abandon the Butler Branch. *See Aiken, supra* n. 6.

Having concluded that Conrail did not abandon its interest in the property prior to the transfer of the property to Buffalo Township, we must address Appellants' argument that upon transfer of the property to an entity that was not a railroad company the property reverted to Appellants. Appellants' argument is premised on Buffalo Township's withdrawal of its interim trail use application with the ICC. According to Appellants, formal ICC authorization was necessary to transfer the property for a non-railroad purpose.[8]

In order to place Appellants' argument in context, we must first provide some background of the relevant pieces of legislation and the purpose for the legislation.

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[8] In this case, the question of whether Conrail's right-of-way was limited to railroad purposes is a question of law. Accordingly, our standard of review is de novo and our scope of review is plenary. *See* supra n. 4.

In *Preseault v. ICC et al.*, 494 U.S. 1, 5-6 (1990), the Court was faced with a challenge to the constitutionality of the National Act under the Takings Clause of the United States Constitution. U.S. Const. amend. V. By way of background, the Court first traced the history of the National Act. The Court explained that Congress was motivated to preserve the loss of railroad lines across the United States[9] and enacted the Railroad Revitalization and Reform Act (hereafter "Reform Act") in 1976.[10] The Reform Act encouraged the conversion of railroad tracks to recreational trails. *Id.* However, the Reform Act was unsuccessful in furthering this purpose and in response thereto, in 1983, Congress enacted amendments to the previously enacted National Act, including the addition of subsection (d) to 1247 of the National Act.[11] *Id.* at 6-7. This subsection sought to "preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." 16 U.S.C. § 1247(d). In order to accomplish this purpose, the subsection provided that:

> in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to

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[9] In 1920, the Nation's railroad track reached its peak of 272,000 miles of track. By 1990, only about 141,000 miles were in use, and experts predicted that the amount of track would decrease by 3,000 miles per year through 2000. *Preseault*, 494 U.S. at 5.

[10] The original version of the National Act was enacted in 1968 and known as the National Trails System Act.

[11] Congress noted that the amendments may be cited as "National Trails System Act Amendments of 1983." 16 U.S.C. § 1241, History.

> restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d). Thus, the effect of this subsection was to deem certain interim trail use a "discontinuance" as opposed to an "abandonment," which had the effect of preventing "property interests from reverting under state law." *Preseault,* 494 U.S. at 8. Ultimately, the Court held this provision constitutional.

Pennsylvania, following the federal lead, enacted the State Act, effective ninety days after December 18, 1990.[12] 32 P.S. § 5611. This legislation gave the Department of Environmental Resources the authority to participate in rails to trails conversions for the purpose of developing "available railroad rights-of-way for public recreational use." 32 P.S. § 5613. The State Act also gave counties or municipalities the right to "accept title to available railroad rights-of-way conveyed by quitclaim deed or warranty deed." 32 P.S. § 5614(c)(2).

Both the National Act and the State Act display a strong legislative policy encouraging the preservation of railroad rights-of-way by using existing rights-of-way for interim recreational trail use. The National Act accomplishes this directly by providing that "interim trail use" is a "discontinuance" rather than an "abandonment" of the

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[12] The date the State Act became effective was prior to the transfer of the property to Buffalo Township, thus we may consider the State Act in reviewing the validity of the transfer to Buffalo Township.

prior railroad use, thus preventing the right-of-way from reverting under state law. *Preseault.* The State Act demonstrates its intent by giving counties and municipalities the right to accept title to the railroad rights-of-way. The inescapable effect of these Acts is to allow a railroad company to transfer its possessory interest in the land, i.e., the right-of-way, to a third party for the limited purpose of interim recreational trail use. The interim trail user essentially holds the railroad company's land in trust until the railroad needs to reactivate service on the rail line. In this way, the legislature has effectively prevented the further loss of railroad track. *See Preseault supra.* Thus, upon the conversion of a railroad line to a recreational trail, the railroad's right-of-way does not terminate but is held in abeyance, and thus, the land does not revert to the property owner.

Keeping these general principles in mind, we now turn to Appellants' specific argument. Appellants insist that the only way the National Act could preserve the right-of-way was if Buffalo Township filed an interim trail use application with the ICC. In the absence of formal ICC authorization, the property reverted to Appellants pursuant to the common law. Appellants find support for their argument in the language of the National Act and the ICC regulations. *See* 49 C.F.R. § 1152.29.

Before beginning our analysis of Appellants' argument, we must point out that we are unable to find any case law on point with the instant case, since the proposed trail user normally files an interim trail use application with the ICC. Thus, we will first set forth the pertinent portion of the statute and regulations and then look at case law, which has spoken to the statute and regulations

in other contexts, to aid us in addressing Appellants' argument.

The relevant portion of section 1247(d) states that:

> If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board **shall impose such terms and conditions** as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. § 1247(d) (emphasis added). Additionally, the ICC regulations provide that if the proposed trail user intends to acquire a rail line for interim trail use, "it must file a comment or otherwise request in its filing [with the ICC] . . . indicating that it would like to do so." 49 C.F.R. § 1152.29(a). The regulations set forth the required information for any interim trail use application and provide the relevant time limits for the application process. 49 C.F.R. § 1152.29(a)(1)-(a)(3) and (b)(1).

Appellants argue that the statutory language, indicating that the ICC can impose terms and conditions on any transfer, implies that the ICC must sanction the transfer in order for it to be effective. However, as noted by the Commonwealth Court in this case, there is nothing in the language of the statute requiring a trail owner, such as Buffalo Township, to comply with the ICC regulations. *Buffalo Township,* 778 A.2d at 1276. The language in the statute referring to "terms and conditions," 16 U.S.C.

§ 1247(d), merely relates to the managerial, financial, and legal responsibility of the trail user and clarifies the obligations that the interim trail user must fulfill in order for the trail conversion to occur. However, this language does not impose any filing obligation on the trail user; rather, any requirement of formal ICC intervention is merely by implication. We refrain from reading such a requirement into the statute where the language of the statute itself does not make such a requirement mandatory for trail conversion.

Further support for our conclusion is provided by a decision of the ICC.[13] In 1991, the ICC entertained the issue of whether a railroad spur was subject to its regulation. *Southern Pacific Transportation Co., Exemption,* 1991 WL 108272 (I.C.C. 1991). The ICC concluded that the spur was subject to state regulation and thus, exempt from its abandonment jurisdiction. *Id.* After reaching this conclusion, the ICC also revoked its Notice of Interim Trail Use ("NITU") because it only had authority to impose trail use where it can authorize abandonment. *Id.* After revoking the NITU, the ICC nevertheless stated, "that the underlying right-of-way can be preserved under 16 U.S.C. § 1247(d) without ICC authorization." *Id.* "The second sentence of section 1247(d) applies to 'any established railroad rights-of- way' and the statute itself provides that their interim trail use 'shall not be treated . . . as an

[13] Courts normally defer to the agency's interpretation of its own regulations. *See, e.g., Edelman v. Lynchburg College,* 122 S.Ct. 1145 (2002) (*citing Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44 (1984)); *Pennsylvania Liquor Control Bd. v. Richard E. Craft American Legion Home Corp.,* 718 A.2d 276, 279 (Pa. 1998) (Newman, J. dissenting).

abandonment of the use of such rights of way for railroad purposes.'" *Id.* Thus, in its administrative decision in *Southern Pacific,* the ICC indicated that the statute in and of itself supported a finding that railroad rights-of-way could be preserved in the absence of ICC authorization.

As to Appellants' argument regarding the ICC regulations, we acknowledge that the language of the regulations appears to support Appellants' argument. Yet, upon closer examination, it becomes clear that Buffalo Township did not need to comply with the regulations in order for the trail conversion to be valid.

The ICC has repeatedly stated that its function with regard to regulating trail use is ministerial. "The Commission is not involved in the negotiations between a railroad and trail use proponent. Nor does it analyze, approve, or set the terms of a trail use agreement." Study of Interstate Commerce Commission Regulatory Responsibilities, 1994 MCC Lexis 104 (October 12, 1994).

Federal case law has embraced the ICC's assertion that its function with regard to trail conversions is perfunctory. For example, in *Goos v. ICC,* 911 F.2d 1283 (8th Cir. 1990), the court entertained the question of whether the ICC needed to comply with the National Environmental Policy Act ("NEPA") when it granted a NITU pursuant to § 1247(d). Appellants argued that the ICC had to perform an environmental assessment pursuant to the NEPA before granting the NITU. In order to answer this question, the Court of Appeals for the Eighth Circuit needed to consider whether the issuance of a NITU or Certificate of Interim Trail Use ("CITU") constituted a "major federal action" obliging the ICC to fulfill the requirements of the NEPA.

In concluding that the ICC did not need to satisfy those requirements, the court accepted the ICC's argument that its issuance of a NITU or CITU is incidental to the abandonment process and merely provides an opportunity for the parties to negotiate a trail use agreement. *Goos,* 911 F.2d at 1293. Moreover, the ICC "*must* issue an NITU or CITU when a private party files a statement of willingness to assume financial responsibility and the railroad agrees to negotiate." *Id.* at 1295 (emphasis in original). The court stated:

> The I.C.C. interprets the section to give it no power to compel a conversion between unwilling parties, and, conversely, no discretion to refuse one if voluntarily negotiated. Once the parties reach agreement, the I.C.C. suggests that it cannot refuse to permit trail use.

Id. Thus, the court agreed that the ICC had "little, if any discretion to forestall a voluntary [trail use] agreement" and held that the ICC's action in these matters was ministerial and therefore, was outside the ambit of the NEPA requirements. *Id.* at 1295-96.

Other courts, following the lead taken by the court in *Goos,* have reached a similar result. *See, e.g., Citizens Against Rails-to-Trails v. Surface Transportation Board,* 267 F.3d 1144, 1153 (U.S. App. D.C. 2001) (rejecting Petitioners' argument that the Board [ICC] has discretion with regard to the issuance of a CITU); *see also Jost v. Surface Transportation Board,* 194 F.3d 79, 89 (U.S. App. D.C. 1999) ("The Act is clear that the Board 'shall' impose a trail condition . . . whenever a railroad is prepared to convey the right of way to an organization that is 'prepared to assume full responsibility' for management of the line.").

Based upon the above, we can surmise that the ICC's involvement in trail conversions is merely procedural. The regulations provide the procedure for the proposed interim trail user to follow for obtaining the NITU or CITU, which in turn, gives the parties the opportunity to negotiate an interim trail agreement. *See, e.g. Goos,* 911 A.2d at 1293. However, the regulations have no effect on the substance of the trail use agreement, rather the substance of the agreement is governed by the requirements of 16 U.S.C. § 1247(d). In other words, the ICC's action with regard to trail conversions amounts to no more than a "rubber stamp" authorizing trail conversions so long as the proposed trail user complies with the requirements of 16 U.S.C. § 1247(d). Section 1247(d) does not require that the proposed trail user file an application with the ICC. Rather, under section 1247(d), the right-of-way can be preserved so long as the interim use is subject to restoration or reconstruction by the railroad company and the trail user is willing to assume full managerial, financial and legal responsibility for the management of such rights-of-way and for any liability arising out of such transfer or use. Therefore, a railroad right-of-way can be converted to a recreational trail where there is a failure to file an application with the ICC, so long as the proposed trail user complies with the requirements of section 1247(d).

In this case, Buffalo Township agreed to take all financial, legal, and managerial responsibility for the trail and Conrail reserved a right to reactivate railroad service if the need ever arose. Thus, the transfer complied with the requirements of section 1247(d). Additionally, the Butler Branch is an established railroad right-of-way. *Southern Pacific, supra.* As such, the right-of-way can be

preserved under the National Act. We refuse to nullify the trail conversion in this instance due to the Township's failure to file an application with the ICC, especially where the ICC's actions in this area amount to no more than a rubber stamp of the application filed by Buffalo Township. We appreciate that if Buffalo Township had not made the inexplicable decision to withdraw its application with the ICC, then the legal action in this case would have been unnecessary. Nevertheless, this lapse does not affect our legal determination that the transfer of the right-of-way to Buffalo Township was effective even in the absence of filing an application for interim trail use with the ICC. Our decision today furthers the legislative purpose to promote interim trail use in order to preserve the railroad company's interest in the property, since Buffalo Township will preserve the right-of-way for the railroad company's future use. Thus, contrary to Appellants' argument, the land did not revert to them and the trial court properly enjoined Appellants from interfering with Buffalo Township's property interest.

Our analysis does not end here, since Appellants challenge the trial court's determination on two other bases. First, Appellants argue that the trial court erred in finding that Buffalo Township established a need for immediate relief and irreparable harm. However, this argument is without merit. As noted at the outset, *see supra* at 3, the trial court granted a *permanent* injunction in this matter, and as such, consideration of irreparable harm and need for immediate relief are not elements that are required for the issuance of a permanent injunction. *Soja, supra.*

Second, Appellants argue that the trial court should have submitted the issue of abandonment for jury consideration. Appellants point to numerous cases, which suggest that abandonment is an issue for the jury to decide. Appellants overlook that a motion for a preliminary or permanent injunction is a matter in equity, and thus, the court "on its own motion or upon the petition of any party may submit to trial by jury." Pa.R.C.P. 1513. A jury's verdict in equity cases is merely advisory, since they "shall not be binding upon the court." Ultimately, it would have been within the trial court's discretion to submit the issue to the jury and to decide whether to accept the jury's determination regarding abandonment.[14]

Based upon the analysis herein, we affirm the decision of the Commonwealth Court.

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[14] We disagree with the dissenting opinion's suggestion that it was improper for Appellee to invoke the trial court's equitable jurisdiction. In *Williams v. Bridy,* 136 A.2d 832 (Pa. 1957), we explained that "[i]t is the duty of the court when an injunction bill has been filed to inquire and ascertain whether the individual or corporation seeking the relief has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which it sought to be enjoined." *Id.* at 836. If a clear legal right to the property exists then an action in equity is proper. *Id.* As the dissent acknowledges, the trial court concluded that the facts were clear and there was no room for doubt and thus, Appellee properly invoked the equitable jurisdiction of the trial court. Dissenting slip opinion at 2. Our appellate review confirms the trial court's decision and we likewise conclude that Appellee had a clear legal right to the possessory property interest in this case.

The dissent also injects an issue regarding actual possession into this case by citing to the recent Supreme Court of Pennsylvania case *Siskos v. Britz,* 790 A.2d 1000 (Pa. 2002). *Siskos* is inapt to any analysis in this case. The question in that case was whether the court must rule upon possession before determining whether an Action in Ejectment lies in a particular case. We are not entertaining a similar issue in this case.

Mr. Justice Saylor files a dissenting opinion in which Mr. Justice Nigro joins.

Judgment Entered December 31, 2002,

/s/ John A. [Illegible]
DEPUTY PROTHONOTARY

[J-24-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BUFFALO TOWNSHIP, Appellee v. CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL AND MARGIE PURCELL, Appellants	No. 86 WAP 2001 Appeal from the Order of the Commonwealth Court entered June 14, 2001, at No. 1875CD2000, affirming the Order of the Court of Common Pleas of Butler County, Civil Division, entered on July 31, 2000, at No. 00-50009. ARGUED: March 6, 2002

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: DECEMBER 31, 2002

In rejecting Appellants' contention that their right to a jury trial was implicated, the majority indicates that Appellants overlook that a request for preliminary or permanent injunction is addressed to a court's equitable jurisdiction, and there simply is no right to a jury trial in

an equity action. *See* Majority Opinion, *slip op.* at 16-17. Appellants, however, do address this point, in effect, with the contention that it was improper for the common pleas court to invoke its equitable jurisdiction to resolve what is effectively a land title controversy.

I find merit in this argument. *See Williams v. Bridy,* 391 Pa. 1, 7, 136 A.2d 832, 836 (1957); *see also Teacher v. Kijurina,* 365 Pa. 480, 484-85, 76 A.2d 197, 200 (1950) ("title to real estate is ordinarily not properly raised by an action in equity unless it be by bill in partition, for the sound reason that in ejectment proceedings (the classic method of determining title to real estate), the parties are entitled to have disputed facts settled by a jury"); *accord Dairy Queen, Inc. v. Wood,* 369 U.S. 470, 471-73, 82 S. Ct. 894, 896-97 (1962). Indeed, in the present case, the common pleas court recognized the salient restrictions on its equitable jurisdiction, but merely circumvented them by indicating that the facts were clear and there was no room for doubt. *See Buffalo Twp. v. Jones,* EQ. No. 00-50009, *slip op.* at 6 (C.P. Butler Jul. 31, 2000). However, the question whether title reverted to Appellants by virtue of an abandonment of Conrail's right-of-way appears to have been keenly disputed, is treated as a fact-laden issue by the majority, and is itself within the range of issues in a land title controversy that must be determined by a jury. *See generally Quarry Office Park Assoc. v. Philadelphia Elec. Co.,* 394 Pa. Super. 426, 436, 576 A.2d 358, 363 (1990).

In my view, the common pleas court's order could potentially be validly sustained (putting aside other questions of appropriate procedure) if the record established that Appellee maintained actual possession of the disputed tracts as of the time of the filing of its complaint.

Cf. Siskos v. Britz, 567 Pa. 689, 701-02, 790 A.2d 1000, 1008 (2002) (establishing actual possession as the litmus in determining whether a right to a jury trial pertains in a land controversy). However, the common pleas court made no specific finding in this respect, and, although the record is somewhat vague on the point, there appears to be evidence that one or more of Appellants may have held actual possession for a substantial time period, including in the relevant time frame. *See, e.g.*, N.T., May 24, 2000, at 21, 26, 64, 68; N.T., July 5, 2000, at 131, 154, 171-72; N.T., Jul. 24, 2000, at 11, 15, 24, 29. Accordingly, I am unable to join the majority in approving the grant of a permanent injunction on the record presented.

Mr. Justice Nigro joins this dissenting opinion.

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Buffalo Township,	:	No. 1875 C.D. 2000
	:	ARGUED:
v.	:	May 7, 2001
Carl E. Jones, Kathryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell And Margie Purcell,	:	
Appellants	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge, HONORABLE DAN PELLEGRINI, Judge (P.), HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION BY JUDGE PELLEGRINI

(Filed: June 14, 2001)

Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell (collectively, Property Owners) appeal from an order of the Court of Common Pleas of Butler County (trial court) granting a permanent injunction enjoining them from blocking or obstructing a recreational trail or threatening, intimidating or coercing agents and employees of Buffalo Township or users of the trail.

This controversy involves a dispute over whether a 20.7-mile long right-of-way formerly known as the Butler Branch of a railway owned and operated by Consolidated Rail Corporation (Conrail) has been abandoned and, if not abandoned, whether it can be used by Buffalo Township as

a recreational trail. In the late 1860s, Conrail (formerly known as the Western Pennsylvania Railroad Company) constructed the Butler Branch that ran between Freeport, Armstrong County and Butler, Butler County. In the process of constructing the railway, Conrail secured rights-of-way and easements over privately-owned property through condemnation proceedings and right-of-way agreements.[1]

Pursuant to Section 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748, Conrail notified the Interstate Commerce Commission (ICC)[2] of its intent to file an application for abandonment of the Butler Branch railroad line due to insufficient revenue on October 31, 1985. Subsequently, Conrail filed a request for approval of abandonment of the railroad line with the ICC on June 5, 1987. On September 14, 1987, the ICC issued a Certificate of Decision and Order authorizing Conrail to abandon the 20.7-mile of the railroad line known as the Butler Branch.

In the early spring of 1990, B. Sykes Ltd., a salvage company, purchased the rails and ties from Conrail on the right-of-way and removed the rails and ties along the railroad line. On June 11, 1991, Conrail conveyed by quitclaim deed all of its rights, title and interest in the

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[1] The Butler Branch railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit and Winfield. However, only Buffalo Township is a party to this action.

[2] On January 1, 1996, the ICC ceased to exist and its duties were transferred to the Surface Transportation Board ("STB") in the Department of Transportation. ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995).

property to B. Sykes Ltd. who, in June 1991, in turn, conveyed by quitclaim deed all of its rights, title and interest in the property to Buffalo Township on June 14, 1991.

In 1992, Buffalo Township began to develop the railway property as a recreational trail pursuant to the Pennsylvania Rails to Trails Act, Act of December 18, 1990, P.L. 748, 32 P.S. §§5611-5622 (Pennsylvania Trails Act), and the National Trails System Act, 16 U.S.C. §§1241-1251 (National Trails Act). Seeking to enjoin adjacent property owners from interfering with the public's use of the trail, Buffalo Township filed a complaint in equity and simultaneously filed a motion for preliminary injunction which the trial court granted. Ultimately, the trial court granted a permanent injunction based on its finding that Conrail did not abandon the right-of-way, and Buffalo Township had the authority under the National Trails Act to construct the recreational trail and enjoined Property Owners from blocking or obstructing the trail in any way, threatening, intimidating or coercing agents and employees of Buffalo Township or any individuals using the trail. This appeal followed.[3]

I.

Normally, a railroad right-of-way terminates and the property interest reverts back to the property owner when

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[3] Our scope of review in cases involving a permanent injunction is limited to whether the trial court abused its discretion or committed an error of law. *Licensed Beverage Association of Philadelphia v. Board of Education of the School District of Philadelphia,* 669 A.2d 447 (Pa.Cmwlth.1995).

the land ceases to be used for railroad purposes. *See Brookbank v. Benedum-Trees Oil Company,* 389 Pa. 151, 131 A.2d 103 (1957); *Quarry Office Park Associates v. Philadelphia Electric Company,* 576 A.2d 358 (Pa. Superior 1990); *Lacy v. East Broad Top Railroad & Coal Co.,* 77 A.2d 706 (Pa. Superior 1951). Property Owners contend that because the right-of-way has ceased being used for railroad purposes, interest in the property reverts to them under Pennsylvania law.

While that is normally true, in order to establish a nationwide system of nature trails, Congress enacted the National Trail Systems Act, 16 U.S.C. §§1241-1251, *as amended,* in 1968.[4] Under this Act, Congress reserved to itself the right to designate scenic and historical trails, and delegated to the Secretaries of the Interior and Agriculture the authority to designate recreational trails and to develop and administer the trails system. *See* 16 U.S.C. §§1243, 1244 and 1246. The Act further provided that state or local governments or federal authorities could acquire the land necessary for a designated trail through cooperative agreements with landowners or by purchase; however, if all voluntary means for acquiring the right-of-way failed, the appropriate Secretary was given limited power to utilize condemnation proceedings in order to acquire private lands. 16 U.S.C. §1246.

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[4] The Pennsylvania Rails to Trails Act operates as an enabling act authorizing the Pennsylvania Department of Environmental Resources to participate in abandonment proceedings before the ICC for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking and authorizing the department, counties or municipalities to accept title, by gift or purchase, to available railroad rights-of-way for interim trail use.

Concerned about the substantial decrease in railway tracks throughout the country and in an effort to preserve railroad rights-of-way by converting unused rights-of-way to recreational trails, Congress enacted substantial amendments to the National Trail Systems Act in 1983. *See* 16 U.S.C. §§1241-1251. Those amendments authorized the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails. 16 U.S.C. §1241. Section 8(d) of the National Trail Act provides that a railroad wishing to cease operations along a particular route may negotiate with a state, municipality or private group that is prepared to assume financial and managerial responsibility for the right-of-way. 16 U.S.C. §1247(d).

The constitutionality of the National Trails Act was addressed by the United States Supreme Court in *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990). Concluding that the Act was reasonably adapted to two legitimate congressional purposes under the Commerce Clause – preserving rail corridors for future railroad use and permitting public recreational use of trails, the Court upheld the constitutionality of the National Trails Act as a valid exercise of congressional power under the Commerce Clause. In doing so, it held that railroad rights-of-way could be converted into recreational trails notwithstanding whatever reversionary property interests existed under state law.

The Court also addressed whether the National Trails Act violated the Fifth Amendment by precluding reversion of state property interests resulting in a taking of the underlying property owners' future interest in the railroad right-of-way. Although not determining whether a taking had occurred in the case before it, the Court held that a

violation of the Fifth Amendment only occurred where there was a taking of private property for public use without just compensation. The Court further determined that the Fifth Amendment merely required that compensation be made, not that compensation be paid prior to or contemporaneously with the taking. At the time of the actual taking, the only requirement was the presence of a "reasonable, certain and adequate provision for obtaining compensation" and that the property owner had no claim that an unconstitutional taking has occurred unless he or she had first utilized the available provision and received no compensation.

Because even if a taking had occurred, the property owners in *Preseault* had a sufficient remedy under the Tucker Act, 28 U.S.C. §1491(a)(1), or the Little Tucker Act, 28 U.S.C. §1346(a)(2) (creating concurrent jurisdiction in the district courts for such claims not exceeding $10,000 in amount), the Court held that the Fifth Amendment was not violated. Accordingly, where a railroad right-of-way was transformed into a recreational trail further burdening the property owner's fees simple interest, the property owner was forced to seek added compensation either under the Tucker Act or for a *de facto* taking under Section 502 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended,* 26 P.S. §1-502. In this appeal, Property Owners do not make any challenge that there was any uncompensated taking but simply that the National Trails Act does not apply.

II.

The first reason that Property Owners contend that the National Trails Act does not apply to this case is

because that Act requires that a state, political subdivision or private interest reserve a railroad right-of-way for interim use while an abandonment proceeding is ongoing where, in this case, the railroad right-of-way was abandoned in 1987 by order of the ICC. It argues that once abandonment proceedings were completed, the railroad right-of-way had been dissolved and could not be rail banked for future railroad purposes or utilized for an interim use under the Act, and, therefore, Buffalo Township had no right to develop the right-of-way as a recreational trail. While they acknowledge that for there to be an abandonment of a railroad right-of-way, there must be an actual abandonment demonstrated by intent to abandon accompanied by external acts effecting that intention, *id.*; *Burnier v. Department of Environmental Resources,* 611 A.2d 1366 (Pa. Cmwlth. 1992), Property Owners argue that the facts of this case establish both an intent on the part of Conrail to abandon the Butler Branch and external acts effectuating that intention, which include the following:

- On October 31, 1985, Conrail filed a Notice of Insufficient Revenues with the ICC.
- On June 8, 1987, Conrail requested approval from the ICC to abandon the Butler Branch pursuant to 45 U.S.C. §748.
- On September 14, 1987, the ICC issued a Certificate and Decision approving Conrail's request to abandon the Butler Branch.
- Conrail terminated railroad service prior to December 31, 1987.
- Conrail sold rails and ties to B. Sykes, Ltd., a salvage company, in the spring of 1990.

- B. Sykes, Ltd. removed the rails and ties from the Butler Branch.
- On June 7, 1990, Buffalo Township requested an Interim Trail Use from the ICC but later withdrew the request.
- The ICC acknowledged Buffalo Township's decision to withdraw its request and discontinued the proceeding.
- On June 11, 1991, Conrail, by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to B. Sykes, Ltd.
- On June 14, 1991, B. Sykes, Ltd., by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to Buffalo Township.

Buffalo Township, however, argues that it is clear that Conrail did not abandon its right-of-way because in conveying its interest in the right-of-way to B. Sykes Ltd., it reserved the right to re-enter the right-of-way to resume railroad activities as evidenced by the language of the quitclaim deeds from Conrail to B. Sykes Ltd. and subsequently from B. Sykes Ltd. to Buffalo Township. Specifically, Buffalo Township relies on the following language of the deed from Conrail to B. Sykes Ltd.:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining

property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.

* * *

Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Likewise, Buffalo Township argues that Conrail's reservation of the right to re-enter the property was acknowledged and preserved in the quitclaim deed between B. Sykes Ltd. and itself which stated, in part:

EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining

property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.[5]

Property Owners at oral argument contended that the language of the deed only involved Conrail's access while the removal of the track was underway and in no way indicated that Conrail did not intend to permanently abandon the right-of-way. While that language is a reasonable interpretation of those provisions, Buffalo Township's interpretation of the language that Conrail reserved a right to re-enter the property in order to resume its previous railroad activities or to reconstruct its rail line is equally reasonable. Where, as here, the language in a contract is ambiguous and subject to different reasonable interpretations, what the agreement means is determined by the surrounding facts and circumstances and is a decision for the trier of fact. *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385 (1986).[6] Because, as the

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[5] Buffalo Township also argues that Conrail could not have abandoned the right-of-way because Pennsylvania law requires that a railroad seek approval from the Pennsylvania Public Utility Commission (PUC) before it can abandon a right-of-way. Specifically, it argues that because Section 2709 of the Public Utility Code, 66 Pa.C.S. §2709, requires that before disposing of real property previously used as a railroad bed a public utility engaged in a railroad business must notify the township in which the real property is located and any disposition of property without complying with the section is voidable, Conrail could not have abandoned its property without following those notification requirements. However, Section 2709 of the Public Utilities Code does not conclusively bar a railroad from abandoning its right-of-way but it merely provides that a transfer of property is voidable. Therefore, it does not invalidate the transaction automatically.

[6] An ambiguity exists if the language is subject to two or more reasonable interpretations. *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa.Cmwlth.1994), *petition for allowance of appeal denied*, 541 Pa. 628, 661 A.2d 875 (1995).

trier of fact, the trial court found that the language of the deeds reserved the right to re-enter the property to Conrail, absent an abuse of discretion, we must defer to that determination. *See In re Hall,* 731 A.2d 617 (Pa. Superior 1999).

In this case, while Conrail petitioned for and received approval from the ICC to abandon its rail line and subsequently, by quitclaim deed, conveyed its interest in the property to a salvage company, that alone is not sufficient to establish abandonment. Because a conclusion that abandonment has occurred is so severe because it forever extinguishes the right-of-way, even a certificate approving abandonment or that the rail line has not been used or has been transferred to a non-railroad entity is not sufficient. *See e.g. Birdsboro Municipal Authority v. Reading Company and Wilmington & Northern Railroad,* 758 A.2d 222 (Pa. Superior 2000); *Burnier; Quarry Office Park Associates; Lawson v. Simonsen,* 490 Pa. 509, 417 A.2d 155 (1980); *Lacy.* Here, the trial court found that Conrail, in conveying its interest in the right-of-way to B. Sykes Ltd., and consequently to Buffalo Township, reserved a right to re-enter the property and to establish or maintain a rail line for potential future railroad activities upon the right-of-way and that Conrail did not intend to abandon the right-of-way. *See e.g. Birdsboro.* Because the trial court did not abuse its discretion in finding that Conrail did not abandon the right-of-way, Property Owners failed to

establish that Conrail abandoned the right-of-way prior to Buffalo Township's acquisition. [7]

III.

Even if the railroad right-of-way was not abandoned, Property Owners contend that Buffalo Township had no authority to develop and operate a recreational trail under the National Trails Act because that Act requires that a trail sponsor seeking to transform a former railroad right-of-way into a recreational trail receive approval in the form of an Interim Trail Use from the ICC, which Buffalo Township failed to obtain. Specifically, they argue that Buffalo Township failed to comply with the requirements of 49 C.F.R. §1152.29, which provides that a political subdivision must file a petition indicating that it would

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[7] Even if Conrail terminated its railroad service, Buffalo Township contends the right-of way would not have been abandoned because Conrail, through its predecessor, the Western Pennsylvania Railroad Company, acquired the right-of-way property pursuant to the General Railroad Act of 1849, Act of February 19, 1849, P.L. 79, which provides, in part, "[t]hat upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight." Section 18 of the General Railroad Act of 1849. Under Section 18 of that Act, the right-of-way does not revert to Property Owners if the General Assembly desires to use it for a highway. What this provision seems to be saying is that the land was not only taken for a railroad right-of-way but also for a public highway. Section 20, though, requires that compensation be paid if the property is going to be used for such a purpose. Even though that is evidence that the right-of way would not have been abandoned, the Commonwealth has not adopted the right-of-way for highway purposes, so Buffalo Township cannot use that as an argument that it has a right to use the right-of-way as a trail which it contends is nothing more than a pedestrian highway.

like to use a rail line as a recreational trail. That section provides in part:

> Prospective use of rights-of-way for interim trail use and rail banking.
>
> (a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so.

While Buffalo Township concedes that it did not follow the procedure set forth in the ICC regulations promulgated under the National Trails Act at 49 C.F.R. §1152.29, it argues that the National Trails Act does not require a municipality to obtain ICC approval in order to develop and operate a recreational trail pursuant to the Act. In support of its contention, Buffalo Township relies on an ICC decision denying an interim trail use application because it lacked jurisdiction over the abandonment of a railroad spur track wherein the ICC stated:

> We are revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C. 10903 or 10505. Because the track at issue here is a spur, we do not have such jurisdiction over it. *We note, however, that the underlying right-of-way can be preserved under 16 U.S.C. 1247(d) without ICC authorization. The second sentence of section 1247(d) applies to "any established railroad rights-of-way" and the statute itself provides that their interim trail use "shall*

not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes."

Southern Pacific Transportation Company – Exemption – Abandonment of Service in San Mateo County, California, (Docket No. AB-12, slip op. filed February 20, 1991) (emphasis added).

To determine whether Congress intended to require states, political subdivisions or private entities to obtain ICC approval before developing and operating a recreational trail on a railroad right-of-way as an interim use, we look to the language of the National Trails Act. Section 8(d) of the Act, 16 U.S.C. §1247(d), provides:

Interim use of railroad rights-of-way.

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. §801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad

> purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Nowhere in Section 1247(d) does the Act require a municipality, which has accepted full responsibility for management of the right-of-way, including legal and financial liability arising out of its use as a recreational trail, to obtain approval from the ICC in order to take advantage of the protections of the Act. Moreover, the clear intent of Congress in enacting the National Trails Act – to encourage states, public subdivisions and private interests to establish trails in an effort to preserve for possible future railroad use of rights-of-way not currently in use, 16 U.S.C. §1247(a), – clearly supports the ICC's interpretation. Because the ICC in *Southern Pacific Transportation Company* concluded that a railroad right-of-way can be preserved for interim use as a recreational trail pursuant to the National Trails Act without ICC authorization, and that interpretation does not conflict with the clear language and intent of the Act and is reasonable, we will defer to their interpretation.[8]

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[8] In reviewing an agency's interpretation of a statute and its own regulations, unless the language is clear, we are required to defer to the

(Continued on following page)

Because Buffalo Township was not required to obtain ICC approval to develop and operate a recreational trail and has fulfilled all of the requirements set forth in Section 8(d) of the National Trails Act, including assuming full responsibility for management of the right-of-way and for any legal or financial liability arising out of the operation of the recreational trail, it was entitled to develop the right-of-way for interim trail use purposes pursuant to the National Trails Act.[9]

Accordingly, because Conrail did not abandon its railroad right-of-way and Buffalo Township was entitled to develop and operate a recreational trail pursuant to the National Trails Act, injunctive relief enjoining Property Owners from interfering with the public's use of the trail was appropriate and the decision of the trial court is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

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agency's interpretation of the statute and its own regulations. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Tool Sales & Service Co. v. Commonwealth*, 536 Pa. 10, 637 A.2d 607 (1993); *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945); *Pelton v. Com., Dept. of Public Welfare*, 514 Pa. 323, 523 A.2d 1104 (1987).

[9] Property Owners also contend that the trial court erred in failing to submit the abandonment issue to a jury. However, because this action was brought in equity, even if the issue had been submitted to a jury, that determination would have been merely advisory and the final decision on the issue would have been made by the trial court. *See* Pa. R.C.P. 1513. Additionally, Property Owners contend that the trial court erred in finding that an immediate need for relief and irreparable harm existed. However, because those are factors to be considered in a preliminary injunction proceeding rather than a permanent injunction proceeding, we need not address those issues.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Buffalo Township	:	
	:	
v.	:	
	:	
Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell,	:	No. 1875 C.D. 2000
	:	
Appellants	:	

ORDER

AND NOW, this 14th day of June, 2001, the order of the Court of Common Pleas of Butler County, No. 00-50009, dated July 31, 2000, is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

[STAMP] Certified from the Record
JUN 14 2001 and Order Exit

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP **Plaintiff,**	:	
v.	:	**CIVIL DIVISION**
CARL E. JONES, KATHERYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL and MARGIE PURCELL,	:	**EQ. No. 00-50009**
Defendants.	:	

For Plaintiff: **Lawrence P. Lutz, Esq.**
For Defendants: **William Claney Smith, Esq.**

Judge: **Martin J. O'Brien, P.J.** **July 31, 2000**

MEMORANDUM OPINION AND ORDER OF COURT

On May 5, 2000, Plaintiff Buffalo Township filed a Motion for a Preliminary Injunction and the Court granted said Motion. Defendants Carl E. Jones, *et al.* were enjoined, *inter alia*, "from blocking obstructing threatening intimidating, or coercing agents and employees of the Township of Buffalo or individuals using the Butler-Freeport Community Trial. . . . " Defendants Carl and Kathryn Jones, Larry and Kassie Tredway, David and Sylvia Jones (Carl Jones' son and daughter-in-law), and Jerry and Margie Purcell (Carl Jones' son-in-law and daughter) have subsequently filed a Motion to Dissolve the Preliminary Injunction.

Pursuant to Pennsylvania Rule of Civil Procedure 1531 the Court conducted lengthy hearings to determine whether the injunction should be dissolved, modified, or made final.

This controversy is part of a dispute over rights-of-way, easements, *et cetera,* of an approximately twenty-one (21) mile parcel of land formerly known as the Butler Branch of a railway operated by Consolidated Rail Corporation ("Conrail") (formerly Western Pennsylvania Railroad Company). Conrail obtained its interest in these properties by a variety of means including grants of rights-of way and easements, and condemnations. The railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit, and Winfield.

In October 1968, the National Trails System Act was passed for the purpose of establishing trails to serve the outdoor recreational needs of the public. ***See*** 16 U.S.C.A. §§ 1241-1251. The Act encouraged States and local agencies and private interest groups to assist in the development of a National Trails System and contemplated the use of former railways as trails. ***See id***.

The Pennsylvania Legislature subsequently enacted the Rails to Trails Act in December 1990 for the purpose of acquiring available railroad rights-of-way and developing them into public recreational trails. ***See*** 32 P.S. §§ 5611-5622.

On June 11, 1991, Conrail conveyed by quitclaim deed all of its "right, title and interest" in the railway property to B. Sykes Ltd. ***See*** Plaintiff's Exhibit No. 1. On June 14, 1991, B. Sykes Ltd. Conveyed by quitclaim deed all of its "right, title and interest" in the railway property to Buffalo Township. ***See*** Plaintiff's exhibit No. 2.

About 1992, Plaintiff Buffalo Township began to develop the railway property as a walking and biking trail in cooperation with the Pennsylvania Rails to Trails Act, 32 P.S. §§ 5611-5622, and the National Trails Systems Act, 16 U.S.C.A. §§ 1241-1251. ***See*** N.T., 5/24/00, at 17. Plaintiff Buffalo Township received federal, state, local and private monetary contributions for the development of the trail and invested approximately $364,000.00 in its development. ***See id.*** at 18-19.

Defendants Carl Jones, *et al.* do not dispute that Conrail had an interest in the property by grants of rights-of-way, easements, *et cetera*. Defendants Carl Jones, *et al.*, dispute, however, that Conrail transferred its right, title and interest in the railway property ultimately to Plaintiff Buffalo Township. Instead, Defendants Carl Jones, *et al.* claim Conrail abandoned the railway property thereby causing Conrail's interests in the land to revert back to Defendants Carl Jones, *et al.*

Presently, Plaintiff Buffalo Township alleges Defendants Carl Jones, et al., who own property adjacent to the trail, are blocking access to and use of the trail. Plaintiff Buffalo Township alleges Defendants Carl Jones, *et al.* are placing blockades, including wooden fencing, stone, barbed wire, dirt, and debris, at various entrances to the trail and along the trail. These blockades, Plaintiff Buffalo Township contends, inhibit individuals from using and enjoying the trail and prevent emergency access to the trail.

The Superior Court of Pennsylvania has held that in order to sustain an injunction, the plaintiff must establish (1) a clear right to relief, (2) an immediate need for relief, and (3) an irreparable injury if the injunction is not

granted. ***See Sovereign Bank v. Harper***, 674 A.2d 1085, 1091 (Pa.Super. 1996).

Clear Right to Relief

The plaintiff has the burden of establishing a clear right to relief by showing the plaintiff has title or other legal rights to the property. ***See Carringer v. Taylor***, 586 A.2d 928, 931 (Pa.Super. 1990).

The Supreme Court of Pennsylvania has stated "if the kernel of the controversy is the legal title to land, then equity cannot be invoked." ***See Williams v. Bridy***, 136 A.2d 832, 836 (Pa. 1957). Plaintiff's legal right to use, occupation, or enjoyment of the property must be clear. ***See id.***

The Superior Court of Pennsylvania has stated "where the plaintiff's right has not been established at law, or is not clear, [the plaintiff] is generally not entitled to remedy by injunction." ***See St. Mark's Evangelical Lutheran Church v. Briarcliff Realty Co.***, 177 A.2d 169, 171 (Pa.Super. 1962) (citing ***Hunter v. McKlveen, Prothonotary***, 353 Pa. 357, 45 A.2d 222 (1946)). If, however, "the plaintiff's title is clear, and all evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief although there has been no adjudication of the title at common law." ***See St. Mark's***, 177 A.2d at 171.

Under Pennsylvania Law a railroad's use of land it obtained by rights-of-way, easements, and so forth does not cease until the railroad officially abandons the land. ***See generally Daddona v. Thorpe***, 749 A.2d 475

(Pa.Super. 2000), ***Palm Corp. v. Commonwealth, Dep't of Transp.***, 688 A.2d 251 (Pa.Cmwlth. 1997), ***Thompson v. Maryland and Pennsylvania R.R. Preservation Soc'y***, 612 A.2d 450 (Pa.Super. 1992), ***Burnier v. Dep't of Envtl. Resources***, 611 A.2d 1366 (Pa.Cmwlth. 1992).

The Superior Court of Pennsylvania has stated that in order to establish abandonment it must be shown that the dominant tenement (the railroad) had an intention to abandon the easement, right-of-way, *et cetera* coupled with either (1) adverse possession by the owner of the servient tenement, (2) obstruction of the easement, right-of-way, *et cetera* by the dominant tenement that is inconsistent with its further enjoyment, or (3) affirmative acts by the owner of the dominant tenement that renders the use of the easement, right-of-way, *et cetera* impossible. ***See Daddona***, 749 A.2d at 488-89.

The Commonwealth Court of Pennsylvania has held that "[m]ere nonuse of a rail line does not constitute abandonment." ***See Burnier***, 611 A.2d at 1368. The Court also held that interim trail use also does not constitute abandonment of the railway. ***See id***. The railroad company may convey its interest in the land to a "non-railroad" entity without abandoning the railway. ***See id***.

The National Trails Systems Act directs federal agencies to encourage state and local agencies to "preserve established railroad rights-of-ways for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use. . . . " ***See*** 16 U.S.C.A. § 1247(d). Under the National Trails Systems Act, interim use of the railway by means of donating, transferring, leasing, selling or otherwise does not constitute abandonment of the use of such land for railroad

purposes if such interim use is subject to restoration or reconstruction of the railway. ***See id.***

The Pennsylvania Rails to Trails Act was enacted to help facilitate the acquisition, operation, maintenance, and development of available railroad rights-of-way for public recreational trail use. ***See*** 32 P.S. §§ 5611-5622. Under the Rails to Trails Act, counties and municipalities were able to acquire by gift or purchase use of the rights-of-way and accept title to the available railroad rights-of-way in conveyances by quitclaim deed or warranty deed. ***See*** 32 P.S. § 5614(c)(2).

In the present action, Plaintiff Buffalo Township admits that on September 14, 1987 Conrail received authorization from the Interstate Commerce Commission to abandon the line. This certificate of authorization, alone, does not amount to abandonment of the railway. ***See Thompson***, 612 A.2d at 454-56. At most it shows Conrail had an intention of abandoning the railway. ***See id.*** Pennsylvania Law, however, requires proof of an actual abandonment demonstrated by an intent to abandon accompanied by external acts effecting that intention. ***See id.*** at 453, ***Burnier***, 611 A.2d at 1368.

Normally, the determination of whether a railroad has actually abandoned its right of way by acting upon and effecting its expressed intention to abandon is a question for a jury to decide." ***See Thompson***, 612 A.2d at 453. However, the Court need not submit such a question to the jury where the facts are clear and there is no room for doubt. ***See id.***

In the present action Conrail, after obtaining authorization from the Interstate Commerce Commission to abandon the line, conveyed its right, interest, and title in

the property to B. Sykes Ltd. The deed contained the following language:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor [Conrail], permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on over under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.
>
> . . .
>
> Grantor [Conrail] and Grantee [B. Sykes Ltd.] contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

The deed whereby B. Sykes Ltd. conveyed the same right, title, and interest in the railway to Plaintiff Buffalo Township contained similar language contemplating Conrail's potential future use of the property for rail purposes. The language as follows:

EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.

. . .

(7) Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Pursuant to the National Trails System Act interim use of a railway in which the railroad contemplates restoration and reconstruction of the railway for railroad purposes does not constitute abandonment of the railway. ***See*** 16 U.S.C.A. § 1247(d). Furthermore, Pennsylvania Courts recognize that interim use of a railway as a trail does not mean the railway abandoned its interests in the

land such that ownership of the land reverts back to the original landowners. ***See Burnier***, 611 A.2d at 1367.

In the instant case, Conrail conveyed its interest in the land to B. Sykes Ltd. reserving for itself access the railway and future use of the railway upon agreement with B. Sykes Ltd. Shortly after this conveyance, B Sykes Ltd. conveyed its interest in the railway to Plaintiff Buffalo Township reserving again access for Conrail to the railway and use of the railway for railing purposes upon agreement with Plaintiff Buffalo Township. The railway land, albeit cleared of its railway tracks, still retains its geographical layout suitable for railway construction and no structures or impediments have been erected on the land by Plaintiff Buffalo Township or B. Sykes Ltd. that would inhibit the restoration or reconstruction of the railway at a future time. In essence, Plaintiff Buffalo Township is simply preserving the land in the event Conrail chooses to re-start operation of its rail services or a national need for rail services arises. The language in the deeds clearly indicates Conrail contemplated the future possibility of reconstruction and restoration of the railway. Both conveyances of the interest in the land conform with the National Trails System Act and the Pennsylvania Rails to Trails Act. ***See*** 16 U.S.C.A. §§ 1241-1251, 32 P.S. §§ 5611-5622.

Therefore, pursuant to the National Trails System Act because the interim use of the railway as a walking and biking trail is subject to Conrail and/or B. Sykes Ltd.'s restoration and reconstruction of the railway Conrail clearly did not abandon the railway. ***See*** 16 U.S.C.A. § 1247(d). ***See also Daddona***, 749 A.2d at 475, ***Palm Corp.***, 688 A.2d at 251, ***Thompson***, 612 A.2d at 450, ***Burnier***, 611 A.2d 1366.

Conrail did not abandon the railway, and therefore, cause a reversion of its interest in the land to the adjacent landowners. The Court finds Conrail conveyed its interests in this land to B. Sykes, Ltd. who in turn conveyed the same interests to Plaintiff Buffalo Township.

Therefore, the Court finds Plaintiff Buffalo Township, as Grantee of Conrail's interest in the land, has a clear legal right to relief by means of an injunction conditioned upon the establishment of the remaining two elements of an injunction.

Immediate Need for Relief

The second element necessary for a final injunction to be issued is the showing that the need for relief is immediate. ***See Sovereign Bank***, 674 A.2d at 1091.

Albert Roenigk, Chairman of the Board of Supervisors of Buffalo Township, testified that the surface of the trail consisted of crushed limestone. ***See*** N.T., 5/24/00, at 24. He further stated this surface would permit vegetation to grow through it and around it. ***See id.*** at 25. If Plaintiff Buffalo Township did not have continual access to the trail for purposes of performing maintenance work on the trail the trail would become overgrown with vegetation. ***See id.*** at 25-29. Mr. Roenigk remarked that individuals walking on the trail, bicycling on the trail, or otherwise using the trail helped to maintain the trail and stop the growth of vegetation. ***See id.*** The various blockades erected at certain areas of the trail, Mr. Roenigk remarked, have limited Plaintiff Buffalo Township's access to the trail, as well as blocked access to potential users of the trail. ***See id.***

Mr. Roenigk also testified emergency service vehicles, including ambulance, fire, and police vehicles, had trouble easily accessing certain portions of the trail because of the blockades. ***See id.*** at 25-39.

Counsel for Plaintiff Buffalo Township entered into the record several photographs of portions of the trail that depicted the condition of the trail as a result of the blockades and growth of vegetation.

Plaintiff Buffalo Township alleges it invested approximately $364,000.00 in the construction of the trail. If Plaintiff Buffalo Township is not permitted to continuously maintain the trail and if individuals are not continuously permitted to use the trail thereby helping to diminish the growth of vegetation Plaintiff Buffalo Township's investment in the trail will be substantially diminished as the trail will quickly become over grown. Mr. Roenigk stated that without proper maintenance the land quickly looses its characteristics of a trail due to the overgrowth of vegetation. ***See id.*** at 28. The urgency and necessity of maintenance on the trail presents a harm that should be addressed by an injunction.

Furthermore, if proper access continues to be denied and vegetation is permitted to grow the land as it was conveyed to Plaintiff Buffalo Township would soon be no longer suitable land upon which Conrail may reconstruct and restore the railway if it so chooses. The interim use of the land, as indicated by the National Trails System Act, should be designed to maintain the land in a condition that would make reconstruction and restoration of the railway easy and cost efficient. To allow the trail to become overgrown and lose its identity and configuration of a trail would defeat the purpose of the National Trails

System Act. The Court cannot allow this to happen and may address the harm being caused to the trail.

Additionally, access by emergency vehicles is being hampered to areas of the trail. Although Counsel for Defendants Carl Jones, *et al.* argues there have been no or only a very limited number of emergency instances on the trail since its construction the lack of instances is not significant. Rather, the Court is concerned more with whether emergency service vehicles could attend to situations along the trail should the need ever arise. The Court finds given the overgrowth of the trail and the various blockades being erected along the trail emergency vehicles cannot sufficiently and properly service the trail in an efficient and effective manner. Therefore, it is proper to immediately redress this harm being caused to the public by insuring proper access to the trail by emergency service vehicles.

Irreparable Injury

The final element of an injunction is that the harm must be irreparable. ***See Sovereign Bank***, 674 A.2d at 1091. The Superior Court of Pennsylvania has defined "irreparable harm" as injury that cannot adequately be compensated by money damages. ***See id.*** "An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." ***See id.*** at 1093.

In the present case, the Court has heard lengthy testimony and argument concerning the use of this railway as a walking and biking trail by the public. The National Trails System Act contemplates the development of these types of land into recreational areas and historic

trails for use by the public. ***See*** 16 U.S.C.A. § 1247. The Pennsylvania Rails to Trails Act was enacted for the purpose of acquiring, operating maintaining, and developing available railroad rights-of-ways for public recreational trail use. ***See*** 32 P.S. § 5613.

In the present case, the public is being denied use and enjoyment of the trail because of the overgrowth of vegetation. Additionally, the public is being denied use and enjoyment of the trail because of the various blockades erected along the trail, including dirt, stone fencing, hay bails, and barbed wiring. These types of blockades also prevent the safe use of the trail as these types of devices are likely to cause serious injury to unwary and unsuspecting users of the trail. Should the individuals using the trail be injured by such devices it is questionable whether emergency service vehicles would be able to reach the persons for treatment thereby increasing the seriousness of there [sic] injury for lack of treatment.

A monetary value cannot be placed on the public's use and enjoyment of this trail for recreational purposes. The damage caused to the public by the denial of use and enjoyment of the trail because of overgrowth of vegetation, denial of access by blockades, and threat of sustaining injury is not measurable by an accurate pecuniary standard.

Therefore the Court finds the harm caused by the denial of public use and enjoyment of the trail is irreparable.

The Court finds Plaintiff Buffalo Township has established all of the necessary elements for the issuance of a final injunction.

IN THE COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP,	:	
Plaintiff,	:	
v.	:	
CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, and MARGIE PURCELL,	:	**CIVIL DIVISION** **EQ. No. 00-50009**
Defendants.	:	

Judge: Martin J. O'Brien, P.J.

ORDER OF COURT

AND NOW, this 31st day of July 2000, the Court hereby **ORDERS** that a final injunction be entered in this matter whereby:

1. Defendants Carl Jones, *et al.* and all other parties owning property along the trail are enjoined from blocking or obstructing the trail in any way, including erecting blockades of dirt, stone, barbed wire, fencing, or hay bails, and are enjoined from caused other persons to block or obstruct the trail.

2. Defendants Carl Jones, *et al.* are enjoined from threatening, intimidating, or coercing agents and employees of Plaintiff Buffalo Township or any such individuals using the trail and are enjoined from causing other

persons to threaten, intimidate, or coerce agents and employees of Plaintiff Buffalo Township or users of the trail.

3. Defendants Carl Jones, *et al.* are directed to remove all blockades, barriers, and obstructions of any type which they have placed on the trail or have caused to be placed on the trail by other persons.

4. Defendants Carl Jones, *et al.* are enjoined from denying access to the trail by any means.

The Court hereby **DIRECTS** the Sheriff of Butler County and the local and state police to take any appropriate action they deem necessary to enforce this Injunction and to maintain free and open access to the trail for users and for emergency service vehicles. Any violators of this Injunction are to be immediately taken into custody by the authorities and be brought before this Court forthwith. Any person found to have violated this Injunction and in contempt of Court shall pay a fine in the amount of $500.00 in additional to any other fines, costs, restitution, and terms of incarceration the Court shall in its discretion deem appropriate.

The Court hereby **DIRECTS** the Sheriff of Butler County to service upon all of the above named defendants a copy of this Order of Court.

BY THE COURT:

/s/ Martin J. O'Brien
MARTIN J. O'BRIEN, P.J.

CERTIFICATE OF SERVICE

I, William Claney Smith, do hereby certify that a true and correct copy of the Appellants' Application for Reargument, was served on the following attorneys of record by first class mail, postage pre-paid, on January 14, 2003.

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William Claney Smith
Attorney for Appellants

J-24-2002
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BUFFALO TOWNSHIP, Appellee v. CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL AND MARGIE PURCELL, Appellants	:	No. 86 WAP 2001 Application for Reargument

ORDER

PER CURIAM

AND NOW, this 11th of March, 2003, the Application for Reargument is hereby denied.

A True Copy Patricia Nicola
As of March 11, 2003
Attest: /s/ Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

BUFFALO TOWNSHIP

Respondent,

V.

CARL E. JONES, KATHRYN L. JONES, LARRY TREADWAY, KASSIE TREADWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, MARGIE PURCELL,

Petitioners.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER AND DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA AT NO. 1875 C.D. PITTSBURGH

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49 C.F.R. 1152.29 – "Prospective rights of way for interim trail use and rail banking."

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PETITION FOR ALLOWANCE OF APPEAL

This Petition is for the Allowance of an Appeal from the Decision and Order of the Commonwealth Court of Pennsylvania at No. 1875 C. D. 2000, denying an appeal from an injunction granted by the Court of Common Pleas of Butler County, Pennsylvania.

The Opinion of the Commonwealth Court has been reported by West Publishing Company and is available on the internet, and will appear in print in the Atlantic Reporter. The Opinion of the Court of Common Pleas of Butler County has not been reported. Both the order of the Court of Common Pleas and the Order of the Commonwealth Court are appended to this Petition.

The Text of the Order of the Commonwealth Court is as follows:

> "AND NOW, this 14th day of June, 2001, the Order of the Court of Common Pleas of Butler County, No. 00-50009, dated July 31, 2000, is affirmed."
>
> "DAN PELLEGRINI, JUDGE"

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COMMONWEALTH COURT AND THE TRIAL COURT ERR IN THEIR INTERPRETATION AND APPLICATION OF THE NATIONAL TRAILS SYSTEMS ACT, SECTION

8(d) AND 49 C.F.R. 1152.29, WHICH CONTROLS THE OPERATION AND IMPLEMENTATION OF THE ACT, BY HOLDING THAT IT IS NOT REQUIRED TO OBTAIN AN ORDER OF THE INTERSTATE COMMERCE COMMISSION OR SURFACE TRANSPORTATION BOARD AUTHORIZING AN "INTERIM TRAIL USE" ON A FORMER RAILROAD RIGHT OF WAY, TO DEFEAT ABANDONMENT ?

STATEMENT OF THE CASE

I. **DID THE COMMONWEALTH COURT AND THE TRIAL COURT ERR IN THEIR INTERPRETATION AND APPLICATION OF THE NATIONAL TRAILS SYSTEMS ACT, SECTION 8(d) AND 49 C.F.R. 1152.29, WHICH CONTROLS THE OPERATION AND IMPLEMENTATION OF THE ACT, BY HOLDING THAT IT IS NOT REQUIRED TO OBTAIN AN ORDER OF THE INTERSTATE COMMERCE COMMISSION OR SURFACE TRANSPORTATION BOARD AUTHORIZING AN "INTERIM TRAIL USE" ON A FORMER RAILROAD RIGHT OF WAY, TO DEFEAT ABANDONMENT?**

Statement of Facts

The Western Pennsylvania Railroad Company was chartered in 1860 under the General Railroad Law, Act of 1849, February 19, 1849, 67 Purdons § I et seq. In the late 1860s it commenced laying out and constructing a railroad line known as the Butler Branch between Freeport in Armstrong County, and Butler in Butler County.

The Butler Branch Railroad crossed farms in townships which included Buffalo, Winfield, Jefferson, and

Summit Townships. In the process of acquiring its right of way under the Railroad Act of 1849, it petitioned the Court of Quarter Sessions of Butler County for the appointment of Viewers to establish the location and damages to be assessed on many of the farms in the Townships.

One of the farms involved in these proceedings was the farm of Henry Voland also known as Henry Folland. This farm was and is on the border of Winfield and Jefferson Township. The condemnation proceeding at which the right of way easement was taken across the farm of Henry Voland, is 59 October Term 1869. The farm of Carl E. Jones and Kathryn L. Jones, now occupies part of the original Henry Voland farm. Part of the Henry Voland farm is also occupied by the property of David C. Jones and Sylvia J. Jones. The same former Butler Branch railroad right of way crosses the property of Carl E. Jones and Kathryn L. Jones, and David C. Jones and Sylvia J. Jones.

The Western Pennsylvania Railroad Company obtained a railroad right of way in Jefferson Township by Condemnation of the railroad right of way across the farm of Gottleib Michael by condemnation Actions in the Court of Quarter Sessions of Butler County, Pennsylvania, at No. 51 October Term 1869, and No. 91 January Term 1871. The property of Larry Treadway and Kassie Treadway occupy part of the Gottleib Michael farm, and abut the former Butler Branch railroad right of way which was originally condemned.

The Western Pennsylvania Railroad Company obtained a railroad right of way in Winfield Township by right of way agreement granting right of way across the farm of Daniel McLaughlin, which right of way was and is

recorded in the Office of the Recorder of Deeds of Butler County, Pennsylvania, at Deed Book 26-2 page 54.

None of the properties involved in this case are in Buffalo Township, the Respondent.

The Supreme Court of Pennsylvania held that the Western Pennsylvania Railroad Company, the same railroad involved in the original eminent domain proceedings, under its charter obtained only an "easement" "for railroad purposes."

Consolidated Rail Corporation in accord with the Regional Rail Reorganization Act, on October 31, 1985, gave notice to the Interstate Commerce Commission of "Insufficient Revenue" and its intent to file an application for Abandonment of the Butler Branch railroad line. On June 5, 1987 Conrail filed with the ICC a request for "the Commission's approval of the abandonment of the line of rail." On September 14, 1987, the ICC issued a Certificate of Decision and Order authorizing Conrail to abandon the "20.7 miles of line known as the Butler Branch."

Buffalo Township did not participate in the original proceedings before the Interstate Commerce Commission. in June 1987 through September 1987 when the ICC issued its final order of Abandonment.

In May 1990 Conrail sold the rails and ties to B. Sykes, Ltd. (R. 182a, 163a, 512a)

By June 30, 1990, B. Sykes, Ltd. had removed the rails and ties. (R. 512a, R770a R. 512a-513a)

June 30, 1990 When rails and ties were removed from Buffalo, Winfield and Jefferson Townships, it was not

possible to operate a train through without rails and ties. (Testimony of A. Rienigk R. 512a - 513a)

On June 11, 1990, three years after the final Order, Buffalo Township filed with the ICC an Application for a Certificate for Interim Trail Use, and requested that the ICC apply section 8(d) of the National Trails System Act, 16 U.S.C. sub section 1247 (d), to this corridor. In accordance with 49 C.F.R. sub section 1152.29."

On August 14, 1990, the Interstate Commerce Commission voted "to seek further information on whether Conrail had consummated abandonment of the line," and communicated this request to Buffalo Township.

September 12, 1990, Buffalo Township by letter to the Interstate Commerce Commission, withdrew their "Petition for application of Section 8 (d) of the National Trails System Act."

September 19, 1990, the Interstate Commerce Commission confirmed the withdrawal by Buffalo Township of the "request for interim trail use." September 19, 1990, the Interstate Commerce Commission confirmed the withdrawal by Conrail of the Joinder in the request for interim trail use."

The Township of Buffalo has not obtained an Interim Trail Use in compliance with the provisions of 49 C.F.R. § 1152.29. The Chairman of the Supervisors admitted that the right of way was not "railbanked" through the ICC. (R. 400a, 401a)

June 11, 1991, Consolidated Rail Corporation issued an Indenture of quitclaim of "all right, title, and interest" to the Buffalo Branch to B. Sykes, Ltd.

June 14, 1991, B. Sykes, Ltd., issued an Indenture of quitclaim of "all right, title and interest" to the Butler Branch to Buffalo Township.

Nowhere in its Motion for Preliminary Injunction or its Complaint does the Plaintiff plead the source or origin or nature of the "right, title, or interest," which it claims under the quitclaim.

Respondent Buffalo Township does not claim that the operation of a recreational trail in Jefferson and Winfield Townships of the properties of the Petitioners is an exercise of eminent domain by Buffalo Township.

Buffalo Township is the Grantee of whatever were the "rights, title and interest" of B. Sykes, Ltd., and whatever Conrail had remaining to convey. Jefferson Township, and Winfield Township, the situs of the properties of the Defendants, are not grantees and are not a parties to this action. The Townships of Jefferson and Winfield were requested by Buffalo Township to participate in this action as co-plaintiff's and refused to do so.

Buffalo Township asserts its claim to a right of injunction under the "interest" it alleges to have acquired in the Quitclaim Instrument from B. Sykes, Ltd. The "interest" or "rights" which Buffalo Township claims to have acquired is the interest or right to use the Butler Branch railroad line, acquired by the Western Pennsylvania Railroad for railroad purposes under the Railroad Act of 1848. The use for which Buffalo Township claims a right is a use for recreational purposes.

Buffalo Township in 1994, in a separate action, obtained *ex parte*, a Preliminary Injunction against Carl Jones, prohibiting him from obstructing and maintaining a

fence across the former Butler Branch right of way which crossed his property. No injunction was obtained against the other defendants in this case. Before a hearing was conducted on the *ex parte* Preliminary Injunction, the injunction was dissolved.

Carl Jones immediately restored his fences and obstructed the entry by the right of way across his property. The Treadways also immediately fenced off the former right of way on their property, as did later the other Defendants. The fencing and obstructions have been in place for over six years, prior to the injunction.

Counsel for the Plaintiff, Buffalo Township, and Buffalo Township averred in their Reply to New Matter, that:

> "no abandonment could have taken place because of the applicability of the federal and state rails to trails acts." Par. 3, R. 181 a.
>
> "the Consolidated Rail Corporation participated in 'railbanking' the trail corridor for future use." Par. 6, R. 182a
>
> "Conrail participated with Buffalo Township in 'railbanking' the corridor in accordance with federal rails to trails acts." Par. 8. R. 182a
>
> "The National Trails Systems Act makes no such requirement. [that permission for interim trail use from the Interstate Commerce Commission is necessary under the terms of the National Trails Systems Act.]" Par. 13, R. 183a

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

The Trial Court in its Opinion, and the Commonwealth Court held that because of the Application of the National Trails Systems Act, that Conrail did not abandon a railroad right of way traversing the property of the Petitioners, and that the Respondent could use the former railroad right of way for a recreational trail.

The language and finding of the opinion of Judge O'Brien is as follows:

> "**Both Conveyances of the interest in the land conform with the National Trails Systems Act and the Pennsylvania Rails to Trails Act**. **See** 16 U.S.C.A. §§ 1241-1251, 32 P. S. § 5611.
>
> **Therefor, pursuant to the National Trails Systems Act because the interim use of the railway as a walking and biking trail is subject to Conrail and or/B. Sykes, Ltd.'s restoration and reconstruction of the railway Conrail clearly did not abandon the railway**. (Opinion of Judge O'Brien, P. 8, Brief Record P.) (Emphasis supplied.)

In the Commonwealth Court, the language and finding of the opinion of Judge Pellegrini is as follows:

> "**Because Buffalo township was not required to obtain ICC approval to develop and operate a recreational trail and has fulfilled all of the requirements as set forth in Section 8(D) of the National Trails Act**, including assuming full responsibility for management of the right-of-way and for any legal or financial liability arising out of the operation of

the recreational trail, **it was entitled to develop the right-of-way for interim trail use purposes pursuant to the National Trails Act**." (Opinion of Judge Pellegrini, Page 15) (Emphasis supplied)

The Opinion of Judge Pellegrini is:

1. "a question of substance not theretofore determined by the Supreme Court of Pennsylvania;

2. " has been decided in a way probably not in accord with the applicable decisions of the Supreme Court of the United States;

3. "is a question of first impression;

4. "is a departure from the accepted and usual course of judicial proceedings;

5. "it involves an issue of immediate public importance."

The National Trails Systems Act, was amended to provide in Section 8 (d), 16 U.S.C.A. 1247 (d), that the Interstate Commerce Commission [now Surface Transportation Board], "in administering the Railroad Revitalization and Regulatory Reform Act of 1976," 45 U.S.C.A. 801, et seq., authorizes the establishment of "trails ***using* the provisions of such programs**." 16 U.S.C.A. 1247(d) (Emphasis supplied.)

The Act further provided that:

> "in the case of interim use [for trail purposes) of any established railroad-right-of-way . . . such interim use shall not be treated, for the purpose of any law or rule of law, as an abandonment of such rights of way for railroad purposes."

This amendment, the National Trails Systems Act, Section 8 (d) is commonly known as the "Rails to Trails Act." The practice of obtaining an "Interim Trail Use" from the ICC in an abandonment proceeding under the Railroad Revitalization and Regulatory Reform Act and the National Trails Systems Act, is administered by the ICC under the rules regulations and provisions of the Code of Federal Regulations 49 C.F.R. 1152.29, enacted to administer the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C.A. 801 et seq. and programs.

The Code of Federal Regulations 49 C.F.R. 1152.29, governing the creation of "interim trail use and railbanking" provides as follows:

"§ 1152.29 **Prospective use of rights of way, for interim trail use and railbanking**.

"(a) **If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and railbanking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (*in a regulated abandonment proceeding*) or a petition (in an exemption proceeding) indicating it would like to do so**. . . .

"(b)(1)

"(i.) **In every proceeding where a Trails Act request is made, *the Board will determine whether the Trails Act is applicable***. 49 C.F.R. 1152.29 (Emphasis supplied.)

Under the above Acts and Regulations, the Interstate Commerce Commission [now Surface Transportation

Board] is given the ***exclusive*** power and authority to grant or not to grant "Railbanking" in the procedure for abandonment before the ICC [STB]. This requires a timely application for "Railbanking" and the approval by the ICC [STB], and the issuance of a certificate or Order of "***interim trail use.***"

The Supreme Court of the United States has recognized that the granting of an "***interim trail use***" may constitute **a taking by the Federal Government**, of the property rights of the property owners whose land has been subject to an easement for railroad purposes, which easement would otherwise have been extinguished by abandonment. This may be compensated as a taking under the Tucker Act. Preseault v. Interstate Commerce Commission, 494 U.S. 1, 110 S.Ct. 914 (1990)

In Preseault v. United States, 100 F.3d 1525, (1996) the Court of Appeals, Federal Circuit, sitting *en banc*, held that original transfers of interests in land to the railroad created only easements in the railroad, not a fee simple estate; the scope of the easements granted for the maintenance and operation of the railroad did not encompass use of easements for public recreational trails, and the easements were abandoned when the tracks were removed.

The Commonwealth Court erred in concluding that Buffalo Township was "not required to obtain ICC approval . . . and that it was entitled to develop the right-of-way for interim trail use purposes pursuant to the National Trails Act." Judge O'Brien also erred in finding that "the interim use" was "pursuant to the National Trails Systems Act." **Neither Buffalo Township nor Conrail had obtained an "interim trail use" from the ICC**.

The language of Judge Pellegrini's Opinion is as follows:

> "**Because Buffalo Township was not required to obtain ICC approval to develop and operate a recreational trail and has fulfilled all of the requirements set forth in Section 8(d) of the National Trails Act**, including assuming full responsibility for management of the right-of-way and for any legal or financial liability arising out of operation of the recreational trail, **it was entitled to develop the right-of-way for interim trail use pursuant to the National Trails Act**." Opinion of Judge Pellegrini page 15.

The error of Judge Pellegrini is that **under the provisions of the National Trails Systems Act it is necessary to obtain an "interim trail" order from the ICC** or STB, and that **Buffalo Township has not fulfilled all of the requirements of Section 8(d) of the National Trails Act**.

The National Trails Systems Act, which is only one paragraph, includes the specific requirement and language that:

". . . **the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a matter consistent with this chapter** . . . ." 16 U.S.C.A. 1247 (d). The procedure for these applications has been established under 49 C.F.R. 1152.29. Buffalo Township did not comply with the procedure established.

Further, both Conrail and Buffalo Township had withdrawn their request from the ICC for an "Interim

Trail Use." (R. 516a-518a). The Court erred in both fact and law.

The decision of Judge Pellegrini is a question of substance not theretofore determined by the Supreme Court of Pennsylvania.

This finding in the decision of Judge Pellegrini is a departure from the accepted and usual course of judicial proceedings established for determining such issues before the ICC and the STB as recognized in the Courts of Appeal of the United States and the Supreme Court of the United States.

The question presented by the Opinion of Judge Pellegrini, that it is "not required" to obtain approval of the ICC or STB, or to follow the procedures established by 49 C.F.R. 1152.29 to obtain an "interim trail use," or obtain the postponement of abandonment of a railroad right of way under the National Trails Systems Act, 16 U.S.C.A. 1247 (d), is a **question of first impression**.

There is not a single case in the State of Pennsylvania, or the United States, in which such a holding has been made. The Commonwealth Court used ***dicta*** language from an ICC hearing which was not reported and which case was decided on the basis of lack of jurisdiction. No case has been decided on this theory, none reported and no State or Federal Court has so decided. There is no appellate decision on this issue and theory in the United States.

This decision is of great import throughout the United States where there are thousands of miles of former right of way in issue, involving both the use of the rights of way, and also the issue of just compensation under the Tucker

Act. It is submitted that in the Federal Courts that a claim under the Tucker Act would be denied because there has been no Federal Administrative act to effect a "taking" under the National Trails Systems Act, and in actions brought in the Federal Court system, this theory would be rejected.

To affirm the decision of the Commonwealth Court, that it is "not required" for the Federal Government to act through the ICC or the STB in granting "interim trail use" under the National Trails Systems Act and the Railroad Reorganization Act, is to hold that a Township (Buffalo) unilaterally can impose a Federal Taking, obligating the Federal Government to pay just compensation under the Tucker Act, without any administrative action by the Federal Government.

It was not the intention of Congress to authorize local governments to impose a taking for "railbanking" or "interim trail use," without the participation of the Federal Agencies and the ICC in the procedure. There is no ground for such a conclusion. *Inclusio unius exclusio alterius*. By delegating the authority to the Interstate Commerce Commission, and establishing the procedure under 49 C.F.R.1152.29, Congress established the administrative and judicial procedure for creating an "interim trail use" and "railbanking," and excluded all other methods.

As a matter of law the National Trails Systems Act specifically provides that the granting of "interim trail use" is administered under the Railroad Revitalization and Regulatory Reform Act by the Interstate Commerce Commission [now STB] and under the Regulations

provided in 49 C.F.R. 1152.29. The Regulation involved specifically provides that:

> "(i.) **In every proceeding where a Trails Act request is made, *the Board will determine whether the Trails Act is applicable*.** 49 C.F.R. 1152.29 (Emphasis supplied.)

The record establishes unequivocally that neither Buffalo Township nor Conrail complied with the requirements of the National Trails Systems Act and the Code of Federal Regulations to obtain "railbanking" or an "interim trail use," and that both withdrew such a request. 49 C.F.R. 1152.29 specifically requires that in every proceeding only the ICC [now the STB] "will determine whether the Trails Act is applicable."

The evidence on the record clearly establishes that **Buffalo Township and Conrail did not act *pursuant to the National Trails Systems Act*. The Interstate Commerce Commission did not issue an "interim trail use," Buffalo Township and Conrail both withdrew their request for "*interim trail use*" from the ICC. (Testimony of A. Roenigk, R-516a-R. 518a)**

The National Trails Systems Act and the Regulations for its implementation to create an "interim trail use" and "railbanking" requires the Railroad to join in the Petition and to execute a trails agreement or lease with the trail group. In *Fritsch v. Interstate Commerce Commission*, 59 F.3d 248 (C.A. D.C. 1995) it was held that where a trails agreement between the railroad and Monroe County, Indiana, was not executed as required by the Act, that the ICC properly *denied* the County's "request for interim trail under section 1247 because the railroad did not consent as was required under the statute." 59 F.3d at 249.

The *Fritsch* case also held that:

> "Once a railroad consummates abandonment of a bare easement the railroad no loner possesses any property interest to transfer. Such is the case here where CSX only possessed an easement on property belonging to private land owners. Once CSX consummated abandonment CSX's property interests reverted to the landowners. These interests were thus extinguished as a matter of law. Certainly neither section 10906 nor the Trails Act can create a new property interest if abandonment has already occurred." 59 F.3d 252. (Emphasis supplied.)

The withdrawal by Conrail of their joinder in the late filed Petition for "interim trail use," and the failure of Conrail to execute and file with the ICC an "interim trail use" agreement is *evidence of intent to abandon which the Court failed to consider.*

There is no valid legal claim of a right to operate a recreational Trail on the former Butler Branch Railroad right of way, based on an "interim trail use" provided for in the National Trails Systems Act. The Defendant Buffalo Township has not qualified for "interim trail use" under the National Trails Systems Act. Such an "interim trail use" an be issued and obtained only in a proceeding before the Interstate Commerce Commission. [Surface Transportation Board]. 49 C.F.R. 1152.29

"Interim trail use" in Pennsylvania under Burnier v. Department of Environmental Resources,

148 Pa. Cmwlth. 530, 61 A.2d 1366 (1992)

The only "interim trail use" case in Pennsylvania is Burnier v. Department of Environmental Resources, 148 Pa. Cmwlth. 530, 61 A.2d 1366 (1992).

Judge O'Brien attempted to rely on the Pennsylvania case of Burnier v. Department of Environmental Resources, 148 Pa. Cmwlth. 530, 61 A.2d 1366 (1992), for the proposition that:

> "Pennsylvania courts recognize that the interim use of a railway as a trail does not mean the railway has abandoned its interests in the land such that ownership of the land reverts back to the original landowners. *See* ***Burnier***, 611 A.2d at 1367"

Judge O'Brien erred in his representation of the law as set forth in ***Burnier***. Paraphrased the statement of the law as set forth in ***Burnier*** *should* read:

> "Pennsylvania Courts recognize that the interim use of a railway as a trail does not mean that the railway has abandoned its interests in the land such that ownership of the land reverts back to the original landowners, ***where the railroad has executed a trail agreement or 'Trails Act Lease Agreement' in a proceeding before the Interstate Commerce Commission, under the provisions of the Railroad Reorganization and Revitalization Act, the National Trails Systems Act, and 49 CER 1152.29, and an "interim trail use" certificate has been issued by the Interstate Commerce Commission***."

The opinion in Burnier v. Department of Environmental Resources, 148 Pa. Cmwlth. 530, 61 A.2d 1366 (1992) sets forth as follows:

> "In 1988, Conrail determined that it would cease rail service operations along a 62- mile segment running through the scenic Pine Creek Gorge in Tioga and Lycoming Counties and **pursuant to Interstate Commerce Commission (ICC) statutes and regulations, filed a notice off exemption. 49 C.F.R. 1152.50(d)**. On September 12, 1988, **the ICC issued a Notice of interim *Trail Use* or Abandonment. authorizing the conversion of the right-of-way from a rail to a trail use, pursuant to Section 8(d) of the National Trails System Act (National Act) On September 18, 1990, *DER, the interim trail operator, and Conrail entered into* a Trails Act Lease Agreement**." 148 Pa.Cmwlth 530 at 531, 532. 611 A.2d 1366.

The Commonwealth Court in Burnier, holding is that (1) where the ICC had issued an Interim Trail Use, (2) under the provisions of the National Trails System Act 8(d) and 49 C.FR 1152.50(d), and (3) that a "Trails Act Lease" had been executed, that if these requisites are met "the interim trail use is not an abandonment of a railroad right of way." 148 Pa Cmwlth., at 532, 611 A.2d at 1368.

The DER had obtained a lease agreement under the National Trail System Act and the Regulations applicable to obtaining an ITU under the Act. The suspension of the reversionary rights by the Application of the Act under 49 C.F.R. 1152.50(d) has been determined to be a taking by the Federal Government in violation of Constitutional property rights, and the property owner is entitled to just compensation.

Pennsylvania has recognized that in the Burnier case that if an application for "interim trail use" is presented to

the ICC, which complies with all of the regulations and requirements, and the ICC issues an "interim trail use" certificate or Order, then the extinguishment of the railroad easement is effective. No Pennsylvania or Federal case holds that a suspension of the extinguishment can be effectuated in any other manner or as proposed by the Respondent, Judge O'Brien or the Commonwealth Court.

The Federal Government has established a "judicial procedure" for invoking this suspension of property rights, under the Federal Statutes. Rules of strict construction in Constitutional property rights should be applied.

In Preseault v. Interstate Commerce Commission, 494 U. S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990), the Supreme Court of the United States affirmed the Constitutionality of the Rails to Trails Act and recognized that the remedy for the taking was under the Tucker Act in the Court of Federal Claims, for a Fifth Amendment Taking.

In Preseault v. Interstate Commerce Commission, 100 F.3d 1525, (Ct. of Appeals Fed. Cir. 1996), it was held that the issuance of an Interim Trail Use for a rail to trail conversion by the ICC under 49 C.F.R. 1152.50(d), constituted a federal taking under the National Trails Systems Act, when the ICC issued the Interim Trail Use.

It is the action of the Interstate Commerce Commission which makes the National Trails Systems Act effective in instituting the provision that use of a former railroad right of way for trail purposes shall not constitute an abandonment. The triggering of the Act by an "Interim Trail Use" order is what effects a Federal taking.

The regulations issued pursuant to the enactment of the National Trails Systems Act provide the administrative system for effectuating the intent of the Act. The Code of Federal Regulations the Code specifically provides that:

> "(i.) **In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable**." 49 C.F.R. 1152.29 (b) (i.) (Emphasis supplied)

The Bernier case does not apply to the facts and legal situation in the case presently before this Court. In the Bernier case the Department of Environmental Resources filed a Petition with the ICC in the railroad right of way line abandonment proceeding. A lease agreement was executed with the Railroad and approved by the ICC, and under the provisions of the National Trails Systems Act and 49 C.F.R. 1152.29, the ICC issued an Interim Trail Certification.

In the case before this Court, although the Plaintiff Buffalo Township attempted a **late filing** of a Petition for an Interim Trail Use, three years after the Conrail Abandonment application, and almost three years after the abandonment order of the ICC, Buffalo Township withdrew its Petition, and Conrail its consent, because the abandonment had been consummated by sale and removal of the rails and ties.

The National Trails Systems Act has not been applied, as required by 49 C.F.R. 1152.29, to grant the use of the Butler Branch railroad right of way line for recreational trail purposes. If the National trails system had been complied with and the ICC had issued an "Interim Trail Use," there would be no question but that the possessor of the ITU would have the right to an injunction.

Counsel for the Township of Buffalo contends that the National Trails Systems Act does not require approval and issuance of Interim Trail Use Certificates by the ICC (Now the Surface Transportation Board). Buffalo Township offers no authority for this theory. To the contrary, the Code of Federal Regulations has been issued to implement the creation of "Interim Trails" and "Railbanking" under the National Trails Systems Act, 16 U.S.C. 1247 (d), and specifically provides that:

"§ 1152.29 **Prospective use of rights of way for interim trail use and railbanking**.

> "(a) **If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and railbanking pursuant to 16 U.S.C 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating it would like to do so**. . . . .
>
> "(b)(1)
>
> "(i.) **In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable**. 49 C.F.R. 1152.29 (Emphasis supplied.)

Buffalo Township has failed to establish that it has any right to use the abandoned Butler Branch railroad right-of-way under the National Trails Systems Act, and has misrepresented the provisions and applicability of the Act, disregarding the specific provisions of the Act on administration by the ICC, and the provisions of 49 C.F.R. 1152.29.

Judge O'Brien has erred in his interpretation and application of the National Trails Systems Act, and the applicability of the case of Burnier v. Department of Environmental Resources, 148 Pa. Cmwlth. 530, 61 A.2d 1366 (1992).

No "Interim Trails Use" was authorized by the Interstate Commerce Commission, pursuant to the National Trails Systems Act, and therefore, this did not have any effect to postpone or avoid the abandonment of the railroad abandonment of the Butler Branch Railroad by Consolidated Rail Corporation.

Further, the withdrawal of Conrail from the late filed application for an Interim Trail Use, is unequivocal evidence of the Conrail ***intent to abandon***, and further and ***admission of the consummation of abandonment***. Both Conrail and Buffalo Township withdrew their application when the ICC asked them to establish that the abandonment had not been consummated. They recognized that the sale and removal of the rails and ties in the Spring of 1990, had made the right of way inoperable for railroad purposes. (Testimony of A. Roenigk, R. 516a-518a)

The withdrawal by Buffalo Township of the Application for "Interim Trail Use" and "Railbanking," was evidence of and constituted an admission that the abandonment had been consummated by the sale and removal of the rails and ties.

Southern Pacific Transportation Company case

Respondent, and the Commonwealth Court, cite the *Southern Pacific Transportation Company* Exemption – Abandonment of Service proceeding at Docket AB-12, slip op. filed February, 20, 1991, for the proposition that:

> "the underlying right-of-way can be preserved under 16 U.S.C. 1247 (d) without ICC authorization. The second sentence of section 1247(d) applies to 'any established railroad right-of-way' and the statute itself provides that their interim trail use 'shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes.'"

The *Southern Transportation Company* case involved an application for an "interim trail use" in an application for an "exemption" by the railroad company. The ICC dismissed the request for an "interim trail use" on the basis that it did not have jurisdiction over the request for an "interim trail use" under the National Trails Systems Act because it did not have jurisdiction over a "spur" section of rail which is subject only to state jurisdiction. This is an unreported slip opinion.

The slip opinion prefaced the above quotation with the statement that:

> **"We are revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C 10903 or 10505. Because the track at issue here is a spur, we do not have jurisdiction over it."** Docket AB-12, slip op. February 20, 1991

The language relied upon by the Respondent and the Commonwealth Court is pure ***dicta*** and was not in any way logically related to the decision in the matter. The proceeding was decided against granting an "interim trail use." The language on which the Respondent and the Commonwealth Court relies is a totally gratuitous

expression not involved in the trial of the issue. It is not in the category of *stare decisis*.

More particularly, the Respondent and the Commonwealth Court, omitted the full sentence which next follows the language of the sentence on which they would rely in section 1247 (d), which is quoted as follows:

> "If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way, and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then **the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for *interim use* in a manner consistent with this chapter. . . .**"

16 U.S.C.A. 1247 (d), **the "Rail To Trail Act, must be read in its entirety to ascertain the intent of Congress**. It is Section 1247 (d) which creates the provision for "interim trail use of railroad rights-of-way," in a one paragraph section. It establishes the Authority of the Secretary of Transportation through the ICC and the STB to *administer* the Act and specifically provides that "the **Board shall impose such terms and conditions as a requirement of any such transfer or conveyance for interim use** . . . "

The legislation which created the "interim use" for trail purposes, also establishes the administrative authority to create this use and designates the authority to issue such certificate or order. The Administrative authority with the power designated was the Interstate Commerce Commission, now the Surface Transportation Board.

The language on which the Commonwealth Court and the Respondent relies is not only pure dicta, but is also based on a disregard of the total language of 16 U.S.C.A. 1247 (d). "Interim trail use," can only be established by the ICC or STB under the Act.

The use cannot be created by the unilateral actions of a "political subdivision." A political subdivision can only invoke the National Trails Systems Act by compliance with all of the requirements of 16 U.S.C.A. 1247 (d), and 49 C.F.R. 1152.29.

The United States Court of Appeal for the District of Columbia Circuit, which handles cases involving the Interstate Commerce Commission, has held that the requirements of 16 U.S.C.A. 1247 (d), and 49 C.F.R. 1152.29, must be complied with in order to obtain an "interim trail use." In Fritsch v. Interstate Commerce Commission, 59 F.3d 248 (C.A. D.C. 1995) it was held that where a trails agreement between the railroad and Monroe County, Indiana, was not executed as required by the Act, that the ICC properly denied the County's "request for interim trail under section 1247 because the railroad did not consent, as was required under the statute." 59 F.3d at 249.

The Fritsch case also held that:

> "once a railroad consummates abandonment of a bare easement the railroad no longer possesses any property interest to transfer. Such is the case here where CSX only possessed an easement on property belonging to private land owners. Once CSX consummated abandonment, CSX's property interests reverted to the landowners. These interests were thus extinguished as a matter of law. Certainly neither section

10906 nor the Trails Act can create a new property interest if abandonment has already occurred." 59 F.3d 252. (Emphasis supplied.)

APPLICATION OF THE PENNSYLVANIA RAILS TO TRAILS ACT, 32 P.S. 5611-5622, IN RELATION TO THE NATIONAL TRAILS SYSTEMS ACT, 16 U.S.C. 124i-1251, AND 49 C.F.R. 11529.29?

The trial Court stated in its opinion that:

> The Pennsylvania Rails to Trails Act was enacted to help facilitate the acquisition, operation, maintenance, and development of available railroad rights of way for public recreational trail use. **See** 32 P.S. §§ 5611-5622. Under the Rails to Trails Act, counties and municipalities were able to acquire by gift or purchase use of the rights-of-ways and accept title to the available rights-of-way in conveyance by quitclaim deed or warranty deed. **See** 32 P.S. §5614(c)(2). (Opinion P. 5,)
>
> ". . . .
>
> "Both conveyances of the interest in the land conform with the National Trails Systems Act and the Pennsylvania Rails to Trails Act." **See** 16 U.S.C.A. 1241-1251, 32 P. S. 5611-5622. (Opinion P. 8)

The Pennsylvania Rails To Trails Act, 32 P.S. 5610, et seq., was passed December 18, 1990, and became effective sixty days later on February 6, 1991. The abandonment of the Conrail right of way was consummated by the sale of the tracks and abandonment of the Conrail right of way was consummated by the sale of the tracks and ties to B. Sykes, Ltd. and the removal by or before June 30, 1990. Buffalo Township has admitted that the consummation of

the abandonment had been completed, by the withdrawal of its "interim trail request' with the ICC, and the statements of the reasons therefore in the minutes of its meetings. Buffalo Township did not acquire the "interest" of B. Sykes, Ltd. and Conrail, until June 14, 1991, ***one year after the consummation of the abandonment by the sale and removal of the rails and ties***.

The Pennsylvania Rails To Trails Act did not become effective until February 6, 1991, *eight months after the consummation of the abandonment of the railroad right of way by the sale and removal of the rails and ties, and the termination of its operability*

The Pennsylvania Rails to Trails Act establishes as its purpose:

> "to acquire, operate and maintain and develop available railroad rights-of way for public recreational trail use. **The rights-of-way shall be acquired pursuant to this act**." Section 5613.

In section 5614, covering the Acquisition of Land, the act provides:

> "(a) The department is authorized to acquire pursuant to sections 1902-A and 1906-A the act of April 9, 1929, (P.L. 177, No. 175) known as the Administrative Code of 1929, a fee simple absolute title or any lesser interest in land, including easements and leaseholds, for the development of the Rails To Trails Program as provided in this section."
>
> **"(b) Abandoned Railroads. The department is authorized to participate in**

abandonment proceedings with the Interstate Commerce Commission for the purpose of acquiring available rights-of-way as interim trails or railbanking as set forth in section 8(d) of the national Trails Systems Act (Public law 90-543,16 U.S.C. sec. 1247 (d).” (Emphasis supplied.)

The Rails to Trails Act authorized DER to acquire an interest in railroad rights-of way under the provisions of the Administrative Code which is used for all land acquisitions, as in the Chew v. Commonwealth, case supra., where a railroad right of way about to be abandoned, was condemned for highway purposes.

The Rails to Trails Act also authorized DER to participate before the ICC to obtain “use as interim trails or railbanking under the provisions of section 8 (d) of the national Trails Systems Act, which stops or suspends reversionary rights from vesting. The Pennsylvania Rails To Trails Act does not interfere with or suspend the reversionary rights of property owners in an abandoned or about to be abandoned railroad right of way. There is no language in the Act which does so, and the provision of the Act authorizing DER to participate in ICC proceedings to gain “interim trail or railbanking” is a further acknowledgement that the legislature had no such intent.

Section (c) of the Act provides:

> “ . . . municipalities may by gift or purchase: . . . (2) Accept title to available railroad rights-of-way conveyed by quitclaim or warranty deed.”

There is nothing in this language that would create any greater interest in the municipality than that held by the grantor of the quitclaim deed.

There is no language in this section which would defeat or suspend the reversionary interest of the property owners in the abandoned railroad right of way.

The rules governing legislation where property might be taken require strict construction.

> "**The exercise of the right of eminent domain, whether directly by the state, or its authorized grantee, is necessarily in derogation of private right, and the rule is such that such authority must be strictly construed**. Dwarris on Statutes, 750; Mayor, etc. of Allegheny v. O.& P. Railroad Company, 26 Pa. 355; Commonwealth v. Erie & N.R. Co., 27 Pa. 339." Lazarus v. Morris, 212 Pa. 128, 131, 61 A. 815, 816

The Pennsylvania Rail to Trails Act does not provide for the derogation, suspension, or elimination of the reversionary rights of the property owners who have such interests in the former railroad rights-of-way.

The Pennsylvania Department of Transportation has acknowledged that the Rail To Trail Act does not supercede the rights of reversionary property owners in abandoned railroad rights-of-way, and has communicated this to Municipalities and Counties.

In the instance of Buffalo Township, at a meeting in 1994 they were told that the Pennsylvania Rail to Trail Act "didn't hold water" to defeat the reversionary rights. In a meeting with the Armstrong County Commissioners, which is not of record yet in this case, the same Penn DOT right of way agent advised all of the "trail" parties and the

Commissioners that the Act did not defeat reversionary rights.

Buffalo Township has not complied with the Pennsylvania Rails to Trails Act. It did not:

> **"*participate* in abandonment proceedings with the Interstate Commerce Commission for the purpose of acquiring available rights-of-way as interim trails or railbanking as set forth in section 8(d) of the national Trails Systems Act (Public law 90-543, 16 U.S.C. sec. 1247 (d)."**

Buffalo Township withdrew its Petition for Interim Trail Use and Railbanking, because the abandonment had already been consummated by sale and removal of the rails and ties, and legally they could not go forward. Buffalo Township has acquired no interest in the former Butler Branch railroad right-of-way under the Pennsylvania Rails To Trails Act or the National Rails to Trails Act.

Judge Pellegrini notes in his Opinion Page 6 that "In this appeal, Property Owners do not make any challenge that there was any uncompensated taking but simply that the National Trails Act does not apply."

Apparently Judge Pellegrini accepts that the Respondent, Buffalo Township does not have the power of Eminent Domain in Jefferson Township and Winfield Township the situs of the properties and former railroad right of way involved in this case. In fact during argument he acknowledged that this was the reason that de facto eminent domain proceedings were not brought against Buffalo Township.

The Pennsylvania Rail To Trail Act does not give the power of Eminent Domain to acquire railroad rights of way in other townships, outside of the geographical limitations of its own Second Class Township. The Second Class Township Code does not give Buffalo Township the power of Eminent Domain in the Townships of Jefferson and Winfield where the properties in this case are located. **There cannot be a *de facto* taking, by Buffalo township, of the properties of the Petitioners off their property located in Jefferson and Winfield Township.**

Neither can there be a Federal taking under the National Trails Systems Act (Rail to Trail Act) and the Tucker Act, where there has not been compliance with provisions of 16 U.S.C.A. 1247 (d) and 49 C.F.R. 1152.29.

Buffalo Township is a trespasser on the properties of the Petitioners, and the record shows that they were aware of the rights of the Petitioners from the beginning and had totally and intentionally disregarded these rights.

DID THE TRIAL COURT ERR OR ABUSE ITS DISCRETION IN NOT SUBMITTING THE ISSUE OF ABANDONMENT OF THE RAILROAD EASEMENT TO A JURY?

It is admitted by the Defendant Buffalo Township that the railroad easement was acquired by eminent domain across the properties of Foland (Voland), Gotlieb Michael, and by right of way agreement for railroad purposes, across property of George Milheim, by Western Pennsylvania Railroad Company and that these are the rights-of-way crossing the properties of the Defendants. (Admissions 6, 13, 14, 16, 17, 18, 20, R.216a-219a)

In the Answer to Motion for Preliminary Injunction and the Amended Answer to Preliminary Injunction and New Matter, the Defendants stated that "Jury Trial Demanded" (R. 71 a, R. 81 a, R. 154a, R. 166a)

The interest acquired by Western Pennsylvania Railroad Company under their charter was a bare easement for the operation of a railroad, which terminates upon abandonment by the railroad. Western Pennsylvania Railroad Company v. Johnston, 59 Pa. 290 (1868), and cases cited therein. See also Lazarus v. Morris, 212 Pa. 128 (1905); Lance's Appeal, 55 Pa. 16 (1866); Pittsburgh & Lake Erie Railroad v. Bruce, 102 Pa. 23 (1872); Pittock v. Central District & Printing Telegraph Co., 31 Pa. Super. 589 (1906); Quarry Office Park Associates v. Philadelphia Electric Co., 304 Pa. Super 426, 576 A.2d 358 (1990).

In Quarry Office Park Associates v. Philadelphia Electric Company, 394 Pa.Super. 426 at 436, 576 A.2d 358, at 362, the Superior Court reiterated the established rule that

> **"The determination of whether a railroad has actually abandoned its right of way by acting upon and effecting its expressed intention to abandon is a *question for a jury to decide*.** Lawson, supra, 490 Pa. 517, 417 A.2d at 160, Lacy 168 Pa. Super. 358, 77 A.2d at 710"

The Superior Court in the Quarry Office Park case held that:

> "in light of Conrail's application for and receipt of the ICC certificate authorizing abandonment and Conrail's plans for dismantlement of the track, we conclude that a jury question exists on

> whether Conrail intended to abandon the line." 394 Pa.Super. at 439, 576 A.2d at 364.

In this case before the Court, Conrail was in "receipt of the ICC certificate authorizing abandonment." The rails and ties had been sold, dismantled and removed.

The right of way had become inoperable for railroad purposes as a result of the sale and removal of the rails and ties Conrail had withdrawn its Joinder in a request for an "interim trail use" in response to the request from the ICC to establish that the abandonment had not been "consummated." Buffalo Township had withdrawn its late filed request to the ICC for an "Interim Trail Use" and "Railbanking" in response to the ICC request to establish that the abandonment had not been "consummated." The withdrawal of the request for an "Interim Trail Use" and "Railbanking" in the face of a request to establish that the abandonment had not been consummated, is evidence of an admission that the abandonment of the right of way for railroad purposes had been consummated by the sale and removal of the rails and ties making the railway inoperable.

There are reasonable grounds and evidence for a jury to conclude that the abandonment by Conrail had been concluded by June 30, 1990, upon the sale and removal of the rails and ties and the testimony of Albert Roenigk that the railroad had been rendered inoperable.

The lower Court did not consider this evidence, and erroneously also concluded that Conrail and Buffalo Township had acted "pursuant to the National Trails System Act.," which they had not. This case should be remanded for a jury trial as requested by the Defendants.

The Court stated that "the Court need not submit such a question to the jury where the facts are clear and there is no room for doubt." (Opinion P. 6)

The Court erred fundamentally when it found that the Conrail and Buffalo Township had acted "pursuant to the National Trails System Act."

The Court erred as a matter of fact and law when it concluded that "Conrail did not abandon, the railway . . . " and finding that "Plaintiff Buffalo Township, as Grantee of Conrail's interest in the land, has a clear legal right to relief by means of an injunction . . . " (Opinion P. 8)

The Court erred in failing to consider the evidence of withdrawal by Conrail of the joinder in the Application for an "Interim Trail Use," in the face of the ICC request to establish that the abandonment had not been "consummated."

The Court erred in failing to consider the evidence of withdrawal by Buffalo Township of the Application for an "Interim Trail Use," in the face of the ICC request to establish that the abandonment had not been "consummated."

The Court failed to consider the withdrawal of Conrail and Buffalo Township from the Application for an "Interim Trail Use" and "Railbanking" as evidence of an admission that the abandonment had been consummated.

The Court erred in not considering the evidence that the rails and ties had been sold and removed and the railroad was inoperable in June of 1990.

The Court erred in its finding factually and legally that Buffalo Township "had an interim use" of the Trail

that was pursuant to the National Trail System Act, which conclusion is contrary to law and fact, and then using it as a basis for his conclusion that the Plaintiff had a "clear legal right."

The facts recited by the lower Court are **not "clear" nor is there "no room for doubt."** The lower Court's conclusions are based on an erroneous assumption that the National Trail System Act applied to the facts, to create an "interim Trail use." The Court failed to consider the evidence that the abandonment was concluded by June 30, 1990 by sale and removal of the rails and ties; and the testimony of the Plaintiff's Chairman that the railroad had become inoperable; and that the actual abandonment occurred by June 30, 1990, ***one year*** before the transfer of Conrail's interest to Buffalo Township in June of 1991.

The lower Court has erred in its conclusion that there has been established a sufficient proof of title and interest upon which an injunction can be issued. This Court should reverse the lower Court and remand this case for jury trial, where it can be consolidated with the original cases which are at issue for jury trial.

EVEN IF THE RAILROAD RIGHT OF WAY WAS NOT ABANDONED, CONRAIL COULD NOT CONVEY TO ANY PARTY THE RIGHT TO OPERATE A RECREATIONAL TRAIL ON THE FORMER RAILROAD RIGHT OF WAY

What interest in real estate is acquired by the exercise of eminent domain?

The Supreme Court of Pennsylvania in Lazurus v. Morris, 212 Pa. 128, 61 A. 815, (1905), held that the appropriation of land under the power of eminent domain

does not give a fee simple estate in the absence of express statutory language to that effect but only a right to use and occupy the land for the specific purpose for which it is taken. The Act involved in the Lazarus case provided for the use of eminent domain to procure sites for the erection of school houses, "and to use and occupy the same for the purpose of erecting thereon a schoolhouse. The Court held that when this use ceases the title reverts to the original owners.

The Court stated the rule as follows:

> "The right to take private property for this public use is asserted under the power of eminent domain. . . . It can only be called into operation by authority of the Legislature, and must be exercised in the manner, by the tribunal, and with the limitations provided by law. . . . **It therefore becomes necessary for any corporation, *public or private*, or individual claiming thereunder, asserting title under the power of eminent domain, *to point to the provisions of the act of assembly under which the power is asserted. The grantee takes what the act gives, and no more.* If the act gives an absolute estate, and compensation is provided on this basis, the whole title may be acquired. If it only gives a right to use and occupy, the grantee only takes a conditional fee or easement terminable on the abandonment of the use for which the land was appropriated. The appropriation of land under eminent domain does not give a fee simple estate therein, in the absence of statutory language to that effect, but only a right to occupy and to use the land**

for the purpose for which it is taken. Pittsburg etc. v. Bruce, 102 Pa. 23; Lance's Appeal, 55 Pa. 16, 93 Am.Dec.722; Pennsylvania Schuylkill Valley R,R. Company v. Paper Mills, 149 Pa. 18, 24 Atl. 205. ***The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and the rule is that such authority must be strictly construed.*** Dwarris on Statutes, 750; Mayor, etc of Allegheny v. O. & P. Railroad Company, 26 Pa. 355; Commonwealth v. Erie & N.R. Co. 27 Pa. 339, 67 Am. Dec. 471." Lazarus v. Morris, 212 Pa. 128, 131, 61 A. 815, 816.

"it is clear the School district of Hanover township only acquired the right to use and to occupy the land in dispute for school purposes. . . . **But whetever kind of estate, or easement the school district acquired *terminated when it ceased to be used for the purpose for which the land was appropriated, and the title reverted to the original owner or those who hold under him.***" Lazurus v. Morris, 212 Pa. 131, 61 A. 816.

In Lances Appeal, 55 Pa. 16 (1866), in an opinion involving a railroad right of way obtained under the power of eminent domain, the Supreme Court held as follows:

"after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking . . .

" . . .

The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private

> right and the rule in the case is, that the authority is to be strictly construed: Dwarris on Stat. 750; 2 Casey 355; 3 Id. 339; 7 Harris 211. **What is not granted is not to be exercised.** When therefore, the Lackawanna and Bloomsburg Railroad Company, under its charter, and the promoter of the private railroad under the Act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of the right. **They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner, and outside of the authorized use, which must be public or incidental to the public use, the proprietary use is in the original owner**." (Emphasis supplied.) 55 Pa. 16, 23

In a case where the original exercise of eminent domain was for the purpose of constructing a canal, the Supreme Court held that the termination of the use for canal purposes terminated the right of way or easement and that the right of way was not conveyed to a railroad by a sale to the railroad to use for railroad purposes.

In Pittsburgh & Lake Erie Railroad Company v. Bruce, 102 Pa. 23 (1872), the Supreme Court of Pennsylvania sustained and adopted the Opinion of the lower Court and held:

> "The rights given the company 'to enter upon, take possession of and use' lands necessary for the purposes of the canal are no higher than the right 'to enter upon and into, and occupy' lands given by **the general railroad law of**

1849, under which a corporation **only takes an easement in the land**: Western Pennsylvania Railroad Co. v. Johnston, 59 P.S.R. page 290.

". . . .

". . . . **no power is given to them to dispose of any lands taken in an adverse manner** lands and waters necessary for the purpose of the canal must be held and applied thereto. . . .

" . . . it seems to us very plain that the canal company only took an easement in the land of Thomas Bruce. . . .

". . .

"[W]henever the law has given a person or a company a right to enter upon the land of another **for a *special purpose* and such person or company enters for a *different purpose* not authorized by law, he or they will be regarded as trespassers**, and may be sued as such by the owners of the land.

"We hold, therefore, that the defendants have shown no authority from the legislature of Pennsylvania for their entry on the land of the Plaintiffs. (Emphasis supplied.) 102 Pa. 23, 26, 27.

Justice Gordon, further held that:

"**Corporations take those powers which are conferred upon them by the legislature and nothing more.**

". . . .

"**There was, then, in this company but a possession and use, in other words a right of way, and that *for a single purpose*, the**

> **construction and maintenance of a canal, and when the canal was abandoned the use and occupation of the land reverted to the owner of the fee**: Jessup v. Loucks, 5 P.F.S. 350. It follows **the possession having thus *revested* in the owner he may maintain any action that is necessary to regain his rights or to protect his property**: Ridge Turnpike v. Stoever, 6 W.&S. 379." Pittsburgh & Lake Erie Railroad Company v. Bruce, 102 Pa. 23, 30 (1872) (Emphasis supplied.)

In Pittock v. Central District & Printing Telegraph Company, 31 Pa. Super. 5891906), a railroad acquired a right of way across a farm by a condemnation proceeding, under the provisions of the **Railroad Act of February 19, 1849**. The railroad subsequently authorized the **Telegraph Company to erect 10 poles on the right of way.**

The Court sustained an action for trespass and held that:

> "All that was taken from the appellee when the railroad was located across his farm was **the use and possession of his land for railroad purposes**. His estate in and control over his property has only been diminished to that extent. The absolute, exclusive and uncontrolled occupancy of the railroad company goes no further." 31 Pa. Super. 589, 592 (Emphasis supplied.)

In Chew v. Commonwealth of Pennsylvania, 400 Pa. 3307, 161 A.2d 621 (1960), a railroad right of way had been acquired by condemnation. While the railroad right of way was in the process of being abandoned, the Pennsylvania Department of Transportation condemned the

railroad right of way for highway purposes. The Commonwealth paid the railroad $125,000 for a tract of land which tract and payment included the part of the right of way attributable to Chew. The Supreme Court held that the right of way would "by operation of law of reverter, have vested in the plaintiffs, the successors of . . . the original landowners." 400 Pa. 309, 161 A.2d 622.

Quarry Office Park Associates v. Philadelphia Electric Company, 304 Pa. Super. 426, 576 A.2d 358, (1990), reiterated the rules concerning railroad rights of way as follows:

> "**A railroad right of way terminates and the property *interest* reverts back to the grantor or the grantor's successors in title when the land ceases to be used for railroad purposes.** Brookbank, supra, 389 Pa. at 167, 131 A.2d at 112 Lacy v. East Broad Top Railroad & Coal Co., 168 pa. Super. 351, 354, 77 A.2d 706, 708 (1951) To constitute abandonment there must be an intention to abandon, accompanied by 'external acts' by which the intention is carried into effect. Id at 358, 77 A.2d at 710. (Emphasis supplied.)
>
> "The determination of whether a railroad has actually abandoned its right of way by acting upon and effecting its express intention is a question for a jury to decide. Lawson, supra, 490 Pa. at 517, 417 A.2d at 160; Lacy, 168 Pa. Super. at 358, 77 A.2d at 710.

The Superior court also held that it is not necessary for a railroad to apply to the Pennsylvania Public Utility Commission to obtain authority to abandon service where the Railroad has applied to the Interstate Commerce Commission under the Railroad Reorganization Act. The

Court held that: "[I]f abandonment proceedings pursuant to the RRR Act are initiated, as they were in this case the state scheme is preempted.

Consolidated Rail Corporation v. Pennsylvania Public Utility Commission, 565 F. Supp. 153, 156. It is noteworthy that the Pennsylvania Legislature subsequently eliminated any requirement that the PUC approve railroad abandonments. The statutory authority of the PUC over railroad abandonments was repealed by the Act of July 1978, P.L. 598, No. 116, sec. 2, 66 P. S. 1122.

Evidence of Abandonment

October 31, 1985	Conrail files "Notice of Insufficient Revenues" with the Interstate Commerce Commission Record P. 208a, 199a, 233a, Admission 39
June 8, 1987	Consolidated Rail Corporation files Application with the ICC for abandonment of the Butler Branch. Record P. 199a, 223a, Admission 40, Court's finding of Fact in Class Action case R. 769a.
September 14, 1987	Interstate Commerce Commission Issues Certificate and Decision, on abandonment of the "Butler Branch" R. 211a, "Exhibit 'D'" Admission 41, R. 199a, 223a, Court's finding of Fact in Class Action case R. 770a.
December 31, 1987	Railroad service on the Butler Branch was terminated before December 31, 1987. Admission in Plaintiff's Answer to New Matter, Par. 5, 162a, R. 181a.

May 1990 –	Conrail sold rails and ties to B. Sykes, Ltd., a salvage operator. – Admission in Plaintiff Reply to New Matter Par.9 R. 182a, 163a, Testimony of Albert Roenigk R. 512a
Early Spring 1990	B. Sykes, Ltd. commences removing rails and ties. Testimony of Albert Roenigk R. 512a
by June 30, 1990	Rails and ties were removed: Court's finding of Fact in Class Action case R. 770a., Testimony of Albert Roenigk R. 512a-513a
by June 30, 1990	When Rails and Ties were removed from Buffalo, Jefferson, & Winfield Township, it was not possible to operate a train through without the rails and ties. Testimony of Albert Roenigk R. 512a-513a
June 7, 1990	Application filed by Buffalo Township with ICC for "Interim Trail Use" & "Rail Banking," – almost three years from the date of the Final Order of ICC dated September 14, 1987, authorizing Abandonment, and at least 2½ years after termination of service. R.508a-512a
August 14, 1990	Interstate Commerce Commission request to Buffalo Township for "further information of whether Conrail had Consummated abandonment of the line." R. 517a-518a
September 12, 1990	Letter to Interstate Commerce Commission from Buffalo Township, withdrawing application for Interim Trail **Use and Railbanking under**

	"Section S(d) of the National Trails Systems Act." Testimony of Albert Roenigk R. 516a
October 1, 1990	Letter from ICC acknowledging that **"Supervisors [of Buffalo Twp.] and Conrail advised us that they no longer wish to enter into a trail use agreement and seek to withdraw the trail use request**. . . . we will permit the parties to withdraw the trail use request." Testimony of Albert Roenigk R. 518a.
October 1, 1990	Conrail withdrawal of "interim trail use" request approved. Testimony of Albert Roenigk R. 518a. – Letter from ICC.
June 11, 1991	Quitclaim deed from Conrail to B. Sykes, Ltd.
June 14, 1991	Quitclaim deed from B. Sykes, Ltd. to Buffalo Township.

The former railroad right of way was abandoned by June 30, 1990, when all of the tracks and ties which had been sold were removed and the railroad had been rendered inoperable, three years after ICC abandonment Order. The Quitclaim Deed was not issued until a year later.

CONCLUSION

Under the Railroad Act of 1849, and the Charter of the Western Pennsylvania Railroad Company, the Railroad right-of-way granted across the properties was limited to railroad uses, which did not include a recreational trail. Under the Railroad Act the easement also is

extinguished when there has been an abandonment for railroad purposes by the Railroad. Under either circumstance, Buffalo Township is not entitled to operate a recreational trail on the properties of the Petitioners. Even if the right-of-way is not abandoned, a recreational use is not within the scope of the railroad easement granted to the railroad under its charter.

The National Trails Systems Act 16 U.S.C.A. 1247(d) and 49 C.F.R. 1152.29, establish an Administrative judicial procedure for the granting of an "interim trail use," in a proceeding before the ICC and the STB. It requires compliance with the Act and the regulations and requirements set forth in 49 C.F.R. 1152.29. Buffalo Township did not file a Petition with the ICC during the original proceeding before the issuance of an abandonment order. Three years later after the ICC had lost jurisdiction over the subject matter, Buffalo Township attempted a late filing of a Petition under 16 U.S.C.A. 1247(d), and citing 49 C.F.R. 1152.29, in its late filed application. They then withdrew it when they and Conrail were questioned about "consummation" of the abandonment. Conrail also withdrew its joinder in the request. Service had been terminated, the rails and ties had been sold and removed, and the railway had become inoperable.

The ICC under these circumstances had lost jurisdiction to grant an "interim trail use," which would have suspended the extinguishment of the Right of way.

PRAYER FOR RELIEF

The Petitioners pray this Honorable Court to grant the Allowance of an Appeal to the Supreme Court of

Pennsylvania to the Opinion and Order of the Commonwealth Court at No. 1875 C.D. 2000. Petitioners further pray that on Appeal that this Honorable Court reverse the decision and Order of the Commonwealth Court and the Court of Common Pleas of Butler County.

Respectfully submitted,

William Claney Smith, Esq.
Attorney for Petitioners

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Buffalo Township,	:	No. 1875 C.D. 2000
v.	:	ARGUED:
	:	May 7, 2001
Carl E. Jones, Kathryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell And Margie Purcell,	:	
Appellants	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge, HONORABLE DAN PELLEGRINI, Judge (P.), HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION BY JUDGE PELLEGRINI

(Filed: June 14, 2001)

Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell (collectively, Property Owners) appeal from an order of the Court of Common Pleas of Butler County (trial court) granting a permanent injunction enjoining them from blocking or obstructing a recreational trail or threatening, intimidating or coercing agents and employees of Buffalo Township or users of the trail.

This controversy involves a dispute over whether a 20.7-mile long right-of-way formerly known as the Butler Branch of a railway owned and operated by Consolidated Rail Corporation (Conrail) has been abandoned and, if not abandoned, whether it can be used by Buffalo Township as

a recreational trail. In the late 1860s, Conrail (formerly known as the Western Pennsylvania Railroad Company) constructed the Butler Branch that ran between Freeport, Armstrong County and Butler, Butler County. In the process of constructing the railway, Conrail secured rights-of-way and easements over privately-owned property through condemnation proceedings and right-of-way agreements.[1]

Pursuant to Section 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748, Conrail notified the Interstate Commerce Commission (ICC)[2] of its intent to file an application for abandonment of the Butler Branch railroad line due to insufficient revenue on October 31, 1985. Subsequently, Conrail filed a request for approval of abandonment of the railroad line with the ICC on June 5, 1987. On September 14, 1987, the ICC issued a Certificate of Decision and Order authorizing Conrail to abandon the 20.7-mile of the railroad line known as the Butler Branch.

In the early spring of 1990, B. Sykes Ltd., a salvage company, purchased the rails and ties from Conrail on the right-of-way and removed the rails and ties along the railroad line. On June 11, 1991, Conrail conveyed by quitclaim deed all of its rights, title and interest in the

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[1] The Butler Branch railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit and Winfield. However, only Buffalo Township is a party to this action.

[2] On January 1, 1996, the ICC ceased to exist and its duties were transferred to the Surface Transportation Board ("STB") in the Department of Transportation. ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995).

property to B. Sykes Ltd. who, in June 1991, in turn, conveyed by quitclaim deed all of its rights, title and interest in the property to Buffalo Township on June 14, 1991.

In 1992, Buffalo Township began to develop the railway property as a recreational trail pursuant to the Pennsylvania Rails to Trails Act, Act of December 18, 1990, P.L. 748, 32 P.S. §§5611-5622 (Pennsylvania Trails Act), and the National Trails System Act, 16 U.S.C. §§1241-1251 (National Trails Act). Seeking to enjoin adjacent property owners from interfering with the public's use of the trail, Buffalo Township filed a complaint in equity and simultaneously filed a motion for preliminary injunction which the trial court granted. Ultimately, the trial court granted a permanent injunction based on its finding that Conrail did not abandon the right-of-way, and Buffalo Township had the authority under the National Trails Act to construct the recreational trail and enjoined Property Owners from blocking or obstructing the trail in any way, threatening, intimidating or coercing agents and employees of Buffalo Township or any individuals using the trail. This appeal followed.[3]

I.

Normally, a railroad right-of-way terminates and the property interest reverts back to the property owner when

[3] Our scope of review in cases involving a permanent injunction is limited to whether the trial court abused its discretion or committed an error of law. *Licensed Beverage Association of Philadelphia v. Board of Education of the School District of Philadelphia,* 669 A.2d 447 (Pa.Cmwlth.1995).

the land ceases to be used for railroad purposes. *See Brookbank v. Benedum-Trees Oil Company,* 389 Pa. 151, 131 A.2d 103 (1957); *Quarry Office Park Associates v. Philadelphia Electric Company,* 576 A.2d 358 (Pa. Superior 1990); *Lacy v. East Broad Top Railroad & Coal Co.,* 77 A.2d 706 (Pa. Superior 1951). Property Owners contend that because the right-of-way has ceased being used for railroad purposes, interest in the property reverts to them under Pennsylvania law.

While that is normally true, in order to establish a nationwide system of nature trails, Congress enacted the National Trail Systems Act, 16 U.S.C. §§1241-1251, *as amended,* in 1968.[4] Under this Act, Congress reserved to itself the right to designate scenic and historical trails, and delegated to the Secretaries of the Interior and Agriculture the authority to designate recreational trails and to develop and administer the trails system. *See* 16 U.S.C. §§1243, 1244 and 1246. The Act further provided that state or local governments or federal authorities could acquire the land necessary for a designated trail through cooperative agreements with landowners or by purchase; however, if all voluntary means for acquiring the right-of-way failed, the appropriate Secretary was given limited power to utilize condemnation proceedings in order to acquire private lands. 16 U.S.C. §1246.

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[4] The Pennsylvania Rails to Trails Act operates as an enabling act authorizing the Pennsylvania Department of Environmental Resources to participate in abandonment proceedings before the ICC for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking and authorizing the department, counties or municipalities to accept title, by gift or purchase, to available railroad rights-of-way for interim trail use.

Concerned about the substantial decrease in railway tracks throughout the country and in an effort to preserve railroad rights-of-way by converting unused rights-of-way to recreational trails, Congress enacted substantial amendments to the National Trail Systems Act in 1983. *See* 16 U.S.C. §§1241-1251. Those amendments authorized the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails. 16 U.S.C. §1241. Section 8(d) of the National Trail Act provides that a railroad wishing to cease operations along a particular route may negotiate with a state, municipality or private group that is prepared to assume financial and managerial responsibility for the right-of-way. 16 U.S.C. §1247(d).

The constitutionality of the National Trails Act was addressed by the United States Supreme Court in *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990). Concluding that the Act was reasonably adapted to two legitimate congressional purposes under the Commerce Clause – preserving rail corridors for future railroad use and permitting public recreational use of trails, the Court upheld the constitutionality of the National Trails Act as a valid exercise of congressional power under the Commerce Clause. In doing so, it held that railroad rights-of-way could be converted into recreational trails notwithstanding whatever reversionary property interests existed under state law.

The Court also addressed whether the National Trails Act violated the Fifth Amendment by precluding reversion of state property interests resulting in a taking of the underlying property owners' future interest in the railroad right-of-way. Although not determining whether a taking had occurred in the case before it, the Court held that a

violation of the Fifth Amendment only occurred where there was a taking of private property for public use without just compensation. The Court further determined that the Fifth Amendment merely required that compensation be made, not that compensation be paid prior to or contemporaneously with the taking. At the time of the actual taking, the only requirement was the presence of a "reasonable, certain and adequate provision for obtaining compensation" and that the property owner had no claim that an unconstitutional taking has occurred unless he or she had first utilized the available provision and received no compensation.

Because even if a taking had occurred, the property owners in *Preseault* had a sufficient remedy under the Tucker Act, 28 U.S.C. §1491(a)(1), or the Little Tucker Act, 28 U.S.C. §1346(a)(2) (creating concurrent jurisdiction in the district courts for such claims not exceeding $10,000 in amount), the Court held that the Fifth Amendment was not violated. Accordingly, where a railroad right-of-way was transformed into a recreational trail further burdening the property owner's fees simple interest, the property owner was forced to seek added compensation either under the Tucker Act or for a *de facto* taking under Section 502 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended,* 26 P.S. §1-502. In this appeal, Property Owners do not make any challenge that there was any uncompensated taking but simply that the National Trails Act does not apply.

II.

The first reason that Property Owners contend that the National Trails Act does not apply to this case is

because that Act requires that a state, political subdivision or private interest reserve a railroad right-of-way for interim use while an abandonment proceeding is ongoing where, in this case, the railroad right-of-way was abandoned in 1987 by order of the ICC. It argues that once abandonment proceedings were completed, the railroad right-of-way had been dissolved and could not be rail banked for future railroad purposes or utilized for an interim use under the Act, and, therefore, Buffalo Township had no right to develop the right-of-way as a recreational trail. While they acknowledge that for there to be an abandonment of a railroad right-of-way, there must be an actual abandonment demonstrated by intent to abandon accompanied by external acts effecting that intention, *id.*; *Burnier v. Department of Environmental Resources,* 611 A.2d 1366 (Pa. Cmwlth. 1992), Property Owners argue that the facts of this case establish both an intent on the part of Conrail to abandon the Butler Branch and external acts effectuating that intention, which include the following:

- On October 31, 1985, Conrail filed a Notice of Insufficient Revenues with the ICC.
- On June 8, 1987, Conrail requested approval from the ICC to abandon the Butler Branch pursuant to 45 U.S.C. §748.
- On September 14, 1987, the ICC issued a Certificate and Decision approving Conrail's request to abandon the Butler Branch.
- Conrail terminated railroad service prior to December 31, 1987.
- Conrail sold rails and ties to B. Sykes, Ltd., a salvage company, in the spring of 1990.

- B. Sykes, Ltd. removed the rails and ties from the Butler Branch.
- On June 7, 1990, Buffalo Township requested an Interim Trail Use from the ICC but later withdrew the request.
- The ICC acknowledged Buffalo Township's decision to withdraw its request and discontinued the proceeding.
- On June 11, 1991, Conrail, by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to B. Sykes, Ltd.
- On June 14, 1991, B. Sykes, Ltd., by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to Buffalo Township.

Buffalo Township, however, argues that it is clear that Conrail did not abandon its right-of-way because in conveying its interest in the right-of-way to B. Sykes Ltd., it reserved the right to re-enter the right-of-way to resume railroad activities as evidenced by the language of the quitclaim deeds from Conrail to B. Sykes Ltd. and subsequently from B. Sykes Ltd. to Buffalo Township. Specifically, Buffalo Township relies on the following language of the deed from Conrail to B. Sykes Ltd.:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining

property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.

* * *

Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Likewise, Buffalo Township argues that Conrail's reservation of the right to re-enter the property was acknowledged and preserved in the quitclaim deed between B. Sykes Ltd. and itself which stated, in part:

EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining

property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.[5]

Property Owners at oral argument contended that the language of the deed only involved Conrail's access while the removal of the track was underway and in no way indicated that Conrail did not intend to permanently abandon the right-of-way. While that language is a reasonable interpretation of those provisions, Buffalo Township's interpretation of the language that Conrail reserved a right to re-enter the property in order to resume its previous railroad activities or to reconstruct its rail line is equally reasonable. Where, as here, the language in a contract is ambiguous and subject to different reasonable interpretations, what the agreement means is determined by the surrounding facts and circumstances and is a decision for the trier of fact. *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385 (1986).[6] Because, as the

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[5] Buffalo Township also argues that Conrail could not have abandoned the right-of-way because Pennsylvania law requires that a railroad seek approval from the Pennsylvania Public Utility Commission (PUC) before it can abandon a right-of-way. Specifically, it argues that because Section 2709 of the Public Utility Code, 66 Pa.C.S. §2709, requires that before disposing of real property previously used as a railroad bed a public utility engaged in a railroad business must notify the township in which the real property is located and any disposition of property without complying with the section is voidable, Conrail could not have abandoned its property without following those notification requirements. However, Section 2709 of the Public Utilities Code does not conclusively bar a railroad from abandoning its right-of-way but it merely provides that a transfer of property is voidable. Therefore, it does not invalidate the transaction automatically.

[6] An ambiguity exists if the language is subject to two or more reasonable interpretations. *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa.Cmwlth.1994), *petition for allowance of appeal denied*, 541 Pa. 628, 661 A.2d 875 (1995).

trier of fact, the trial court found that the language of the deeds reserved the right to re-enter the property to Conrail, absent an abuse of discretion, we must defer to that determination. *See In re Hall,* 731 A.2d 617 (Pa. Superior 1999).

In this case, while Conrail petitioned for and received approval from the ICC to abandon its rail line and subsequently, by quitclaim deed, conveyed its interest in the property to a salvage company, that alone is not sufficient to establish abandonment. Because a conclusion that abandonment has occurred is so severe because it forever extinguishes the right-of-way, even a certificate approving abandonment or that the rail line has not been used or has been transferred to a non-railroad entity is not sufficient. *See e.g. Birdsboro Municipal Authority v. Reading Company and Wilmington & Northern Railroad,* 758 A.2d 222 (Pa. Superior 2000); *Burnier; Quarry Office Park Associates; Lawson v. Simonsen,* 490 Pa. 509, 417 A.2d 155 (1980); *Lacy.* Here, the trial court found that Conrail, in conveying its interest in the right-of-way to B. Sykes Ltd., and consequently to Buffalo Township, reserved a right to re-enter the property and to establish or maintain a rail line for potential future railroad activities upon the right-of-way and that Conrail did not intend to abandon the right-of-way. *See e.g. Birdsboro.* Because the trial court did not abuse its discretion in finding that Conrail did not abandon the right-of-way, Property Owners failed to

establish that Conrail abandoned the right-of-way prior to Buffalo Township's acquisition. [7]

III.

Even if the railroad right-of-way was not abandoned, Property Owners contend that Buffalo Township had no authority to develop and operate a recreational trail under the National Trails Act because that Act requires that a trail sponsor seeking to transform a former railroad right-of-way into a recreational trail receive approval in the form of an Interim Trail Use from the ICC, which Buffalo Township failed to obtain. Specifically, they argue that Buffalo Township failed to comply with the requirements of 49 C.F.R. §1152.29, which provides that a political subdivision must file a petition indicating that it would

[7] Even if Conrail terminated its railroad service, Buffalo Township contends the right-of way would not have been abandoned because Conrail, through its predecessor, the Western Pennsylvania Railroad Company, acquired the right-of-way property pursuant to the General Railroad Act of 1849, Act of February 19, 1849, P.L. 79, which provides, in part, "[t]hat upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight." Section 18 of the General Railroad Act of 1849. Under Section 18 of that Act, the right-of-way does not revert to Property Owners if the General Assembly desires to use it for a highway. What this provision seems to be saying is that the land was not only taken for a railroad right-of-way but also for a public highway. Section 20, though, requires that compensation be paid if the property is going to be used for such a purpose. Even though that is evidence that the right-of way would not have been abandoned, the Commonwealth has not adopted the right-of-way for highway purposes, so Buffalo Township cannot use that as an argument that it has a right to use the right-of-way as a trail which it contends is nothing more than a pedestrian highway.

like to use a rail line as a recreational trail. That section provides in part:

> Prospective use of rights-of-way for interim trail use and rail banking.
>
> (a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so.

While Buffalo Township concedes that it did not follow the procedure set forth in the ICC regulations promulgated under the National Trails Act at 49 C.F.R. §1152.29, it argues that the National Trails Act does not require a municipality to obtain ICC approval in order to develop and operate a recreational trail pursuant to the Act. In support of its contention, Buffalo Township relies on an ICC decision denying an interim trail use application because it lacked jurisdiction over the abandonment of a railroad spur track wherein the ICC stated:

> We are revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C. 10903 or 10505. Because the track at issue here is a spur, we do not have such jurisdiction over it. *We note, however, that the underlying right-of-way can be preserved under 16 U.S.C. 1247(d) without ICC authorization. The second sentence of section 1247(d) applies to "any established railroad rights-of-way" and the statute itself provides that their interim trail use "shall*

> *not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes."*

Southern Pacific Transportation Company – Exemption – Abandonment of Service in San Mateo County, California, (Docket No. AB-12, slip op. filed February 20, 1991) (emphasis added).

To determine whether Congress intended to require states, political subdivisions or private entities to obtain ICC approval before developing and operating a recreational trail on a railroad right-of-way as an interim use, we look to the language of the National Trails Act. Section 8(d) of the Act, 16 U.S.C. §1247(d), provides:

> Interim use of railroad rights-of-way.
>
> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. §801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad

> purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Nowhere in Section 1247(d) does the Act require a municipality, which has accepted full responsibility for management of the right-of-way, including legal and financial liability arising out of its use as a recreational trail, to obtain approval from the ICC in order to take advantage of the protections of the Act. Moreover, the clear intent of Congress in enacting the National Trails Act – to encourage states, public subdivisions and private interests to establish trails in an effort to preserve for possible future railroad use of rights-of-way not currently in use, 16 U.S.C. §1247(a), – clearly supports the ICC's interpretation. Because the ICC in *Southern Pacific Transportation Company* concluded that a railroad right-of-way can be preserved for interim use as a recreational trail pursuant to the National Trails Act without ICC authorization, and that interpretation does not conflict with the clear language and intent of the Act and is reasonable, we will defer to their interpretation.[8]

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[8] In reviewing an agency's interpretation of a statute and its own regulations, unless the language is clear, we are required to defer to the

(Continued on following page)

Because Buffalo Township was not required to obtain ICC approval to develop and operate a recreational trail and has fulfilled all of the requirements set forth in Section 8(d) of the National Trails Act, including assuming full responsibility for management of the right-of-way and for any legal or financial liability arising out of the operation of the recreational trail, it was entitled to develop the right-of-way for interim trail use purposes pursuant to the National Trails Act.[9]

Accordingly, because Conrail did not abandon its railroad right-of-way and Buffalo Township was entitled to develop and operate a recreational trail pursuant to the National Trails Act, injunctive relief enjoining Property Owners from interfering with the public's use of the trail was appropriate and the decision of the trial court is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

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agency's interpretation of the statute and its own regulations. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Tool Sales & Service Co. v. Commonwealth*, 536 Pa. 10, 637 A.2d 607 (1993); *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945); *Pelton v. Com., Dept. of Public Welfare*, 514 Pa. 323, 523 A.2d 1104 (1987).

[9] Property Owners also contend that the trial court erred in failing to submit the abandonment issue to a jury. However, because this action was brought in equity, even if the issue had been submitted to a jury, that determination would have been merely advisory and the final decision on the issue would have been made by the trial court. *See* Pa. R.C.P. 1513. Additionally, Property Owners contend that the trial court erred in finding that an immediate need for relief and irreparable harm existed. However, because those are factors to be considered in a preliminary injunction proceeding rather than a permanent injunction proceeding, we need not address those issues.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Buffalo Township	:	
v.	:	
Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell,	:	No. 1875 C.D. 2000
Appellants	:	

ORDER

AND NOW, this 14th day of June, 2001, the order of the Court of Common Pleas of Butler County, No. 00-50009, dated July 31, 2000, is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

[STAMP] Certified from the Record
JUN 14 2001 and Order Exit

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP	:	
Plaintiff,	:	
v.	:	**CIVIL DIVISION**
CARL E. JONES, KATHERYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL and MARGIE PURCELL,	:	**EQ. No. 00-50009**
Defendants.	:	

For Plaintiff: **Lawrence P. Lutz, Esq.**
For Defendants: **William Claney Smith, Esq.**

Judge: **Martin J. O'Brien, P.J.** **July 31, 2000**

MEMORANDUM OPINION AND ORDER OF COURT

On May 5, 2000, Plaintiff Buffalo Township filed a Motion for a Preliminary Injunction and the Court granted said Motion. Defendants Carl E. Jones, *et al.* were enjoined, *inter alia*, "from blocking obstructing threatening intimidating, or coercing agents and employees of the Township of Buffalo or individuals using the Butler-Freeport Community Trial. . . . " Defendants Carl and Kathryn Jones, Larry and Kassie Tredway, David and Sylvia Jones (Carl Jones' son and daughter-in-law), and Jerry and Margie Purcell (Carl Jones' son-in-law and daughter) have subsequently filed a Motion to Dissolve the Preliminary Injunction.

Pursuant to Pennsylvania Rule of Civil Procedure 1531 the Court conducted lengthy hearings to determine whether the injunction should be dissolved, modified, or made final.

This controversy is part of a dispute over rights-of-way, easements, *et cetera,* of an approximately twenty-one (21) mile parcel of land formerly known as the Butler Branch of a railway operated by Consolidated Rail Corporation ("Conrail") (formerly Western Pennsylvania Railroad Company). Conrail obtained its interest in these properties by a variety of means including grants of rights-of way and easements, and condemnations. The railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit, and Winfield.

In October 1968, the National Trails System Act was passed for the purpose of establishing trails to serve the outdoor recreational needs of the public. ***See*** 16 U.S.C.A. §§ 1241-1251. The Act encouraged States and local agencies and private interest groups to assist in the development of a National Trails System and contemplated the use of former railways as trails. ***See id.***

The Pennsylvania Legislature subsequently enacted the Rails to Trails Act in December 1990 for the purpose of acquiring available railroad rights-of-way and developing them into public recreational trails. ***See*** 32 P.S. §§ 5611-5622.

On June 11, 1991, Conrail conveyed by quitclaim deed all of its "right, title and interest" in the railway property to B. Sykes Ltd. ***See*** Plaintiff's Exhibit No. 1. On June 14, 1991, B. Sykes Ltd. Conveyed by quitclaim deed all of its "right, title and interest" in the railway property to Buffalo Township. ***See*** Plaintiff's exhibit No. 2.

About 1992, Plaintiff Buffalo Township began to develop the railway property as a walking and biking trail in cooperation with the Pennsylvania Rails to Trails Act, 32 P.S. §§ 5611-5622, and the National Trails Systems Act, 16 U.S.C.A. §§ 1241-1251. ***See*** N.T., 5/24/00, at 17. Plaintiff Buffalo Township received federal, state, local and private monetary contributions for the development of the trail and invested approximately $364,000.00 in its development. ***See id.*** at 18-19.

Defendants Carl Jones, *et al.* do not dispute that Conrail had an interest in the property by grants of rights-of-way, easements, *et cetera*. Defendants Carl Jones, *et al.*, dispute, however, that Conrail transferred its right, title and interest in the railway property ultimately to Plaintiff Buffalo Township. Instead, Defendants Carl Jones, *et al.* claim Conrail abandoned the railway property thereby causing Conrail's interests in the land to revert back to Defendants Carl Jones, *et al.*

Presently, Plaintiff Buffalo Township alleges Defendants Carl Jones, et al., who own property adjacent to the trail, are blocking access to and use of the trail. Plaintiff Buffalo Township alleges Defendants Carl Jones, *et al.* are placing blockades, including wooden fencing, stone, barbed wire, dirt, and debris, at various entrances to the trail and along the trail. These blockades, Plaintiff Buffalo Township contends, inhibit individuals from using and enjoying the trail and prevent emergency access to the trail.

The Superior Court of Pennsylvania has held that in order to sustain an injunction, the plaintiff must establish (1) a clear right to relief, (2) an immediate need for relief, and (3) an irreparable injury if the injunction is not

granted. ***See Sovereign Bank v. Harper***, 674 A.2d 1085, 1091 (Pa.Super. 1996).

Clear Right to Relief

The plaintiff has the burden of establishing a clear right to relief by showing the plaintiff has title or other legal rights to the property. ***See Carringer v. Taylor***, 586 A.2d 928, 931 (Pa.Super. 1990).

The Supreme Court of Pennsylvania has stated "if the kernel of the controversy is the legal title to land, then equity cannot be invoked." ***See Williams v. Bridy***, 136 A.2d 832, 836 (Pa. 1957). Plaintiff's legal right to use, occupation, or enjoyment of the property must be clear. ***See id.***

The Superior Court of Pennsylvania has stated "where the plaintiff's right has not been established at law, or is not clear, [the plaintiff] is generally not entitled to remedy by injunction." ***See St. Mark's Evangelical Lutheran Church v. Briarcliff Realty Co.***, 177 A.2d 169, 171 (Pa.Super. 1962) (citing ***Hunter v. McKlveen, Prothonotary***, 353 Pa. 357, 45 A.2d 222 (1946)). If, however, "the plaintiff's title is clear, and all evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief although there has been no adjudication of the title at common law." ***See St. Mark's***, 177 A.2d at 171.

Under Pennsylvania Law a railroad's use of land it obtained by rights-of-way, easements, and so forth does not cease until the railroad officially abandons the land. ***See generally Daddona v. Thorpe***, 749 A.2d 475

(Pa.Super. 2000), ***Palm Corp. v. Commonwealth, Dep't of Transp.***, 688 A.2d 251 (Pa.Cmwlth. 1997), ***Thompson v. Maryland and Pennsylvania R.R. Preservation Soc'y***, 612 A.2d 450 (Pa.Super. 1992), ***Burnier v. Dep't of Envtl. Resources***, 611 A.2d 1366 (Pa.Cmwlth. 1992).

The Superior Court of Pennsylvania has stated that in order to establish abandonment it must be shown that the dominant tenement (the railroad) had an intention to abandon the easement, right-of-way, *et cetera* coupled with either (1) adverse possession by the owner of the servient tenement, (2) obstruction of the easement, right-of-way, *et cetera* by the dominant tenement that is inconsistent with its further enjoyment, or (3) affirmative acts by the owner of the dominant tenement that renders the use of the easement, right-of-way, *et cetera* impossible. ***See Daddona***, 749 A.2d at 488-89.

The Commonwealth Court of Pennsylvania has held that "[m]ere nonuse of a rail line does not constitute abandonment." ***See Burnier***, 611 A.2d at 1368. The Court also held that interim trail use also does not constitute abandonment of the railway. ***See id***. The railroad company may convey its interest in the land to a "non-railroad" entity without abandoning the railway. ***See id***.

The National Trails Systems Act directs federal agencies to encourage state and local agencies to "preserve established railroad rights-of-ways for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use. . . . " ***See*** 16 U.S.C.A. § 1247(d). Under the National Trails Systems Act, interim use of the railway by means of donating, transferring, leasing, selling or otherwise does not constitute abandonment of the use of such land for railroad

purposes if such interim use is subject to restoration or reconstruction of the railway. ***See id.***

The Pennsylvania Rails to Trails Act was enacted to help facilitate the acquisition, operation, maintenance, and development of available railroad rights-of-way for public recreational trail use. ***See*** 32 P.S. §§ 5611-5622. Under the Rails to Trails Act, counties and municipalities were able to acquire by gift or purchase use of the rights-of-way and accept title to the available railroad rights-of-way in conveyances by quitclaim deed or warranty deed. ***See*** 32 P.S. § 5614(c)(2).

In the present action, Plaintiff Buffalo Township admits that on September 14, 1987 Conrail received authorization from the Interstate Commerce Commission to abandon the line. This certificate of authorization, alone, does not amount to abandonment of the railway. ***See Thompson***, 612 A.2d at 454-56. At most it shows Conrail had an intention of abandoning the railway. ***See id.*** Pennsylvania Law, however, requires proof of an actual abandonment demonstrated by an intent to abandon accompanied by external acts effecting that intention. ***See id.*** at 453, ***Burnier***, 611 A.2d at 1368.

Normally, the determination of whether a railroad has actually abandoned its right of way by acting upon and effecting its expressed intention to abandon is a question for a jury to decide." ***See Thompson***, 612 A.2d at 453. However, the Court need not submit such a question to the jury where the facts are clear and there is no room for doubt. ***See id.***

In the present action Conrail, after obtaining authorization from the Interstate Commerce Commission to abandon the line, conveyed its right, interest, and title in

the property to B. Sykes Ltd. The deed contained the following language:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor [Conrail], permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on over under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.
>
> . . .
>
> Grantor [Conrail] and Grantee [B. Sykes Ltd.] contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

The deed whereby B. Sykes Ltd. conveyed the same right, title, and interest in the railway to Plaintiff Buffalo Township contained similar language contemplating Conrail's potential future use of the property for rail purposes. The language as follows:

EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.

. . .

(7) Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Pursuant to the National Trails System Act interim use of a railway in which the railroad contemplates restoration and reconstruction of the railway for railroad purposes does not constitute abandonment of the railway. *See* 16 U.S.C.A. § 1247(d). Furthermore, Pennsylvania Courts recognize that interim use of a railway as a trail does not mean the railway abandoned its interests in the

land such that ownership of the land reverts back to the original landowners. ***See Burnier***, 611 A.2d at 1367.

In the instant case, Conrail conveyed its interest in the land to B. Sykes Ltd. reserving for itself access the railway and future use of the railway upon agreement with B. Sykes Ltd. Shortly after this conveyance, B Sykes Ltd. conveyed its interest in the railway to Plaintiff Buffalo Township reserving again access for Conrail to the railway and use of the railway for railing purposes upon agreement with Plaintiff Buffalo Township. The railway land, albeit cleared of its railway tracks, still retains its geographical layout suitable for railway construction and no structures or impediments have been erected on the land by Plaintiff Buffalo Township or B. Sykes Ltd. that would inhibit the restoration or reconstruction of the railway at a future time. In essence, Plaintiff Buffalo Township is simply preserving the land in the event Conrail chooses to re-start operation of its rail services or a national need for rail services arises. The language in the deeds clearly indicates Conrail contemplated the future possibility of reconstruction and restoration of the railway. Both conveyances of the interest in the land conform with the National Trails System Act and the Pennsylvania Rails to Trails Act. ***See*** 16 U.S.C.A. §§ 1241-1251, 32 P.S. §§ 5611-5622.

Therefore, pursuant to the National Trails System Act because the interim use of the railway as a walking and biking trail is subject to Conrail and/or B. Sykes Ltd.'s restoration and reconstruction of the railway Conrail clearly did not abandon the railway. ***See*** 16 U.S.C.A. § 1247(d). ***See also Daddona***, 749 A.2d at 475, ***Palm Corp.***, 688 A.2d at 251, ***Thompson***, 612 A.2d at 450, ***Burnier***, 611 A.2d 1366.

Conrail did not abandon the railway, and therefore, cause a reversion of its interest in the land to the adjacent landowners. The Court finds Conrail conveyed its interests in this land to B. Sykes, Ltd. who in turn conveyed the same interests to Plaintiff Buffalo Township.

Therefore, the Court finds Plaintiff Buffalo Township, as Grantee of Conrail's interest in the land, has a clear legal right to relief by means of an injunction conditioned upon the establishment of the remaining two elements of an injunction.

Immediate Need for Relief

The second element necessary for a final injunction to be issued is the showing that the need for relief is immediate. ***See Sovereign Bank***, 674 A.2d at 1091.

Albert Roenigk, Chairman of the Board of Supervisors of Buffalo Township, testified that the surface of the trail consisted of crushed limestone. ***See*** N.T., 5/24/00, at 24. He further stated this surface would permit vegetation to grow through it and around it. ***See id.*** at 25. If Plaintiff Buffalo Township did not have continual access to the trail for purposes of performing maintenance work on the trail the trail would become overgrown with vegetation. ***See id.*** at 25-29. Mr. Roenigk remarked that individuals walking on the trail, bicycling on the trail, or otherwise using the trail helped to maintain the trail and stop the growth of vegetation. ***See id.*** The various blockades erected at certain areas of the trail, Mr. Roenigk remarked, have limited Plaintiff Buffalo Township's access to the trail, as well as blocked access to potential users of the trail. ***See id.***

Mr. Roenigk also testified emergency service vehicles, including ambulance, fire, and police vehicles, had trouble easily accessing certain portions of the trail because of the blockades. ***See id.*** at 25-39.

Counsel for Plaintiff Buffalo Township entered into the record several photographs of portions of the trail that depicted the condition of the trail as a result of the blockades and growth of vegetation.

Plaintiff Buffalo Township alleges it invested approximately $364,000.00 in the construction of the trail. If Plaintiff Buffalo Township is not permitted to continuously maintain the trail and if individuals are not continuously permitted to use the trail thereby helping to diminish the growth of vegetation Plaintiff Buffalo Township's investment in the trail will be substantially diminished as the trail will quickly become over grown. Mr. Roenigk stated that without proper maintenance the land quickly looses its characteristics of a trail due to the overgrowth of vegetation. ***See id.*** at 28. The urgency and necessity of maintenance on the trail presents a harm that should be addressed by an injunction.

Furthermore, if proper access continues to be denied and vegetation is permitted to grow the land as it was conveyed to Plaintiff Buffalo Township would soon be no longer suitable land upon which Conrail may reconstruct and restore the railway if it so chooses. The interim use of the land, as indicated by the National Trails System Act, should be designed to maintain the land in a condition that would make reconstruction and restoration of the railway easy and cost efficient. To allow the trail to become overgrown and lose its identity and configuration of a trail would defeat the purpose of the National Trails

System Act. The Court cannot allow this to happen and may address the harm being caused to the trail.

Additionally, access by emergency vehicles is being hampered to areas of the trail. Although Counsel for Defendants Carl Jones, *et al.* argues there have been no or only a very limited number of emergency instances on the trail since its construction the lack of instances is not significant. Rather, the Court is concerned more with whether emergency service vehicles could attend to situations along the trail should the need ever arise. The Court finds given the overgrowth of the trail and the various blockades being erected along the trail emergency vehicles cannot sufficiently and properly service the trail in an efficient and effective manner. Therefore, it is proper to immediately redress this harm being caused to the public by insuring proper access to the trail by emergency service vehicles.

Irreparable Injury

The final element of an injunction is that the harm must be irreparable. ***See Sovereign Bank***, 674 A.2d at 1091. The Superior Court of Pennsylvania has defined "irreparable harm" as injury that cannot adequately be compensated by money damages. ***See id.*** "An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." ***See id.*** at 1093.

In the present case, the Court has heard lengthy testimony and argument concerning the use of this railway as a walking and biking trail by the public. The National Trails System Act contemplates the development of these types of land into recreational areas and historic

trails for use by the public. ***See*** 16 U.S.C.A. § 1247. The Pennsylvania Rails to Trails Act was enacted for the purpose of acquiring, operating maintaining, and developing available railroad rights-of-ways for public recreational trail use. ***See*** 32 P.S. § 5613.

In the present case, the public is being denied use and enjoyment of the trail because of the overgrowth of vegetation. Additionally, the public is being denied use and enjoyment of the trail because of the various blockades erected along the trail, including dirt, stone fencing, hay bails, and barbed wiring. These types of blockades also prevent the safe use of the trail as these types of devices are likely to cause serious injury to unwary and unsuspecting users of the trail. Should the individuals using the trail be injured by such devices it is questionable whether emergency service vehicles would be able to reach the persons for treatment thereby increasing the seriousness of there [sic] injury for lack of treatment.

A monetary value cannot be placed on the public's use and enjoyment of this trail for recreational purposes. The damage caused to the public by the denial of use and enjoyment of the trail because of overgrowth of vegetation, denial of access by blockades, and threat of sustaining injury is not measurable by an accurate pecuniary standard.

Therefore the Court finds the harm caused by the denial of public use and enjoyment of the trail is irreparable.

The Court finds Plaintiff Buffalo Township has established all of the necessary elements for the issuance of a final injunction.

IN THE COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP,	:	
Plaintiff,	:	
	:	
v.	:	
CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, and MARGIE PURCELL,	:	**CIVIL DIVISION**
	:	**EQ. No. 00-50009**
Defendants.	:	

Judge: Martin J. O'Brien, P.J.

ORDER OF COURT

AND NOW, this 31st day of July 2000, the Court hereby **ORDERS** that a final injunction be entered in this matter whereby:

1. Defendants Carl Jones, *et al.* and all other parties owning property along the trail are enjoined from blocking or obstructing the trail in any way, including erecting blockades of dirt, stone, barbed wire, fencing, or hay bails, and are enjoined from caused other persons to block or obstruct the trail.

2. Defendants Carl Jones, *et al.* are enjoined from threatening, intimidating, or coercing agents and employees of Plaintiff Buffalo Township or any such individuals using the trail and are enjoined from causing other

persons to threaten, intimidate, or coerce agents and employees of Plaintiff Buffalo Township or users of the trail.

3. Defendants Carl Jones, *et al.* are directed to remove all blockades, barriers, and obstructions of any type which they have placed on the trail or have caused to be placed on the trail by other persons.

4. Defendants Carl Jones, *et al.* are enjoined from denying access to the trail by any means.

The Court hereby **DIRECTS** the Sheriff of Butler County and the local and state police to take any appropriate action they deem necessary to enforce this Injunction and to maintain free and open access to the trail for users and for emergency service vehicles. Any violators of this Injunction are to be immediately taken into custody by the authorities and be brought before this Court forthwith. Any person found to have violated this Injunction and in contempt of Court shall pay a fine in the amount of $500.00 in additional to any other fines, costs, restitution, and terms of incarceration the Court shall in its discretion deem appropriate.

The Court hereby **DIRECTS** the Sheriff of Butler County to service upon all of the above named defendants a copy of this Order of Court.

BY THE COURT:

/s/ Martin J. O'Brien
MARTIN J. O'BRIEN, P.J.

USCA – 16 USCA s 1247
(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [> 45 U.S.C.A. S 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior

Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with approval of the Secretary of the Interior.

49 C.F.R. § 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To
Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, ___ (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by ___ (Railroad) and operated by ___ (Railroad). The property, known as ___ (Name of Branch Line), extends from railroad milepost ___ near ___ (Station Name), to railroad milepost ___, near ___ (Station name), a distance of ___ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-___ (Sub-No. ___).

A map of the property depicting the right-of-way is attached.

___ (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See § 1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a

trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with § 1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the Federal Register in the case of a class exemption and within 20 days after publication in the Federal Register of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) Regular and NERSA abandonment proceedings.

(1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trial user for that portion of the right-of-way to be covered by the agreement. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued (10) days after issuance in NERSA proceedings); and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environment matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the CITU and request that it be vacated on a specified date. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C.

10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

(d) Exempt abandonment proceedings.

(1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment

authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the one-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trial user intends to terminate trial use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

[62 FR 34670, June 27, 1997; 64 FR 53268, Oct. 1, 1999]

32 P.S. § 5614. Acquisition of land

(a) Acquisition. – The department is authorized to acquire pursuant to sections 1902-A and 1906-A of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929,[1] fee simple absolute title or any lesser interest in land, including easements and leaseholds, for the development purposes of the Pennsylvania Rails to Trails Program as provided in this section.

(b) Abandoned railroads. – The department is authorized to participate in abandonment proceedings with the Interstate Commerce Commission for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking as set forth in section 8(d) of the National Trails System Act (Public Law 90-543, 16 U.S.C. § 1247(d)).

(c) Acceptance of title. – For purposes of the Pennsylvania Rails to Trails Program, the department, counties or municipalities may by gift or purchase:

(1) Accept title, including nonmarketable title, to available railroad rights-of-way and to any areas abutting the rights-of-way which are needed for the construction of trail-user support facilities.

(2) Accept title to available railroad rights-of-way conveyed by quitclaim deed or warranty deed.

(d) Easements over land acquired. – Easements and rights-of-way upon, over, under, across or along any

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[1] 71 P.S. §§ 510-2 (repealed; see, now, 71 P.S. § 1340.302), 510-6 (repealed; see, now, 71 P.S. § 1340.303).

land, the fee title of which has been acquired by the department, may be granted by the department so long as the use of the easement or right-of-way does not interfere with the purposes of this act.

(e) Transfer of trails to local governmental agencies. – The department may transfer its interest in any recreational trail or portion thereof to a local governmental agency or agencies having jurisdiction over the area in which the recreational trail is located for recreational purposes in a manner consistent with department rules and regulations.

SOUTHERN PACIFIC TRANSPORTATION COMPANY – EXEMPTION – ABANDONMENT OF SERVICE IN SAN MATEO COUNTY, CA

Docket No. AB-12 (Sub-No. 118X)

INTERSTATE COMMERCE COMMISSION

1991 ICC LEXIS 54

February 20, 1991

PANEL:

DECISION

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald. Commissioner Simmons dissented and will submit a separate expression at a later date.

OPINION BY:

SIMMONS, PHILLIPS, McDONALD

OPINION:

We are revoking applicant's use of the class exemption issued under 49 U.S.C. 10505 (for the abandonment of lines that have been out-of-service for at least 2 years), because this line is a spur track that is statutorily exempt from our abandonment jurisdiction under 49 U.S.C. 10907.

BACKGROUND

On June 2, 1987, Southern Pacific Transportation Company (SPT) filed a notice of exemption under 49 CFR 1152, Subpart F – Exempt Abandonments, to abandon its Ravenswood Branch (alternatively, the Ravenswood Drill),

an out-of-service line segment in San Mateo County, CA. The line extends approximately 1.25 miles between milepost 30.92 and milepost 32.17 at or near Ravenswood. The notice of exemption was published in the Federal Register on June 19, 1987 (52 FR 23368) (1987 Exemption), and became effective on July 22, 1987. By decision served July 22, 1987, the Commission imposed a 180-day public use condition (49 U.S.C. 10906) and an historic resources condition (16 U.S.C. 470). On December 15, 1989, the Director of the Office of Proceedings issued a decision imposing trail use/rail banking (December 1989 decision) under the National Trails System Act (Trails Act), (16 U.S.C. 1247(d)).[1]

On December 26, 1989, the National Association of Reversionary Property Owners (NARPO) filed a petition seeking administrative review of the December 1989 decision. It argues that we lack jurisdiction to impose trail use/rail banking because SPT has abandoned the Ravenswood Branch, removing it from our jurisdiction. On February 26, 1990, Horace Robertson, individually and on

[1] Initial requests for interim trail use were denied in our July 22, 1987 decision because SPT, evidently doubting there was any potential for future rail freight use on the line, declined to negotiate. The trail use proponents sought judicial review on September 1, 1987. See Midpeninsula Regional Open Space District and San Mateo County v. ICC and United States of America (Midpeninsula), U.S.C.A., D.C. Cir. No. 87-1495. Two years later, SPT reversed itself and the petition for review was dismissed by the court on January 5, 1990. In a petition seeking the imposition of trail use, filed with us on August 18, 1989, SPT stated that it had signed a trail use agreement, and Midpeninsula would be resolved if we granted its petition. In subsequent correspondence, SPT also asserted that it had not consummated the Ravenswood Branch abandonment, even though the tariffs for the line had been cancelled.

behalf of "other adjoining property owners" along the right-of-way,[2] citing the same argument, also petitioned for administrative review of the December 1989 decision. Additionally, Mr. Robertson challenged the 1987 Exemption, contending that the Ravenswood Branch is a spur/industrial track under 49 U.S.C. 10907, and hence is not subject to our abandonment jurisdiction[3] or available for trail use. SPT did not reply to the petitions.

By decision served June 26, 1990 (June 1990 decision), we reopened the case for additional evidence. Stating that the record was not sufficient to determine our jurisdiction, we directed SPT to file specific information on the spur and abandonment consummation issues and invited it and all other parties to submit other relevant evidence. Slip op. at 2-3. On July 30, 1990, SPT filed opening comments; on August 17, 1990, NARPO filed comments in rebuttal to SPT's comments; and on August 31, 1990, SPT filed reply comments.[4] On August 6, 1990,

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[2] A petition identical to Mr. Robertson's was filed on July 9, 1990, by Tikisa M. Anderson, who also claimed that she represented other landowners. Mr. Robertson and Ms. Anderson clearly can represent their own interests. However, they do not specify who the other landowners are or show that they may represent others. Accordingly, we limit their participation here to themselves. See 49 CFR 1104.4. See also June 1990 decision infra, at 2.

[3] Under section 10907(b), the Commission does not have jurisdiction to regulate the abandonment of spur, industrial, team, switching, or side tracks if the tracks are located entirely in one State.

[4] Two extensions of the evidentiary schedule were granted by the Director of the Office of Proceedings. NARPO seeks reconsideration of the second extension, by which the date for the filing of reply comments was extended to September 4, 1990. NARPO argues that the extension allows the filing of a prohibited reply to a reply. This argument has no merit. The evidentiary schedule set by the Commission's June 1990

(Continued on following page)

the trail use advocates, Midpeninsula Regional Open Space District and San Mateo County (collectively, District) filed a pleading entitled "Opposition to NARPO Petitions." We are accepting this pleading as District's initial comments. On August 31, 1990, reply comments were filed by District.

THE SPUR ISSUE

Mr. Robertson and Ms. Anderson argue that the Ravenswood Branch is a spur. They claim the line was installed to serve the predecessor of Borrmann Steel Co., Inc., in the Ravenswood Industrial Park in East Palo Alto, CA. SPT argues, however, that the Ravenswood Branch is a line of railroad, and previously served several shippers that tendered traffic "presumably" moving in interstate commerce. According to SPT, the branch was constructed in 1912,[5] and was laid with 75-pound rail which was "commonly used at the time and ... [which] is not inadequate for branch line operations." The line is single-ended, extending 1.247 miles from a connection at Ravenswood with SPT's Redwood Jct.-Newark, CA line; accordingly, through trains and overhead traffic cannot be handled.

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decision contemplated that all parties would have an opportunity to reply to other parties' comments. The extension decision did nothing more than lengthen the time for all parties to file reply comments. Accordingly, we deny NARPO's petition.

[5] District suggests that the line may have been in place longer than SPT believes, as an official map of San Mateo County, dating back to 1864, assertedly shows the Ravenswood Drill next to the Town of Ravenswood. District claims the line was intended to serve an industrial and port area known as "Cooley's Landing," a shipping point for lumber and agricultural products.

SPT concedes that it does not know the number of shippers the line initially was intended to serve. It merely indicates that its files identify five shippers intended to be served as a result of subsequent construction. They are: California Lubricating Products Company in 1916; Chipman Chemical Company in 1927; Durant Insulated Pipe Company in 1952; J. B. DeMeter in 1955; and Bissell, Inc. in 1962. According to SPT, the 1927 construction lengthened the Ravenswood Branch by 66 feet, and the construction in all other years added diverging spur or industry tracks to the branch.

C. W. Douglas, SPT's Assistant Vice President-Sales, filed a verified statement asserting that he has personal knowledge of past and present traffic movements in San Mateo County, including movements over the Ravenswood Branch. He states that there has been no demand for service and no traffic on the branch since the early 1970's. The frequency of service and the level of traffic generated on the line in the past cannot be documented, SPT argues, because the carrier did not retain old traffic records for the line, as the Commissioner's regulations at 49 CFR 1220.6 mandate only a 2-year retention period for demurrage records.

SPT alleges that, before filing the subject notice of exemption, it debated whether the Ravenswood Branch constituted an exempt spur that could be retired without seeking this Commission's approval. It claims that it was persuaded to file the notice of exemption after researching Commission caselaw in CNW – Aban. Exemp. – In McHenry County, IL (McHenry), 3 I.C.C. 2d 366, 368 (1987), reversed on other grounds, Illinois Commerce Commission v. ICC, 879 F.2d 917 (D.C. Cir. 1989); and Docket Nos. AB-33 (Sub-No. 42X), Union Pacific Railroad Company-Exemption – To

Discontinue Operations in Shoshone County, ID and AB-37 (Sub-No. 22X), Oregon-Washington Railroad & Navigation Company – Exemption – Abandonment in Shoshone County, ID (not printed), served October 23, 1986, (Shoshone).[6] The Ravenswood Branch, SPT submits, is distinguished from an exempt spur because it once served multiple shippers, was not used to store rolling stock, is not separated from the connecting line by exempt team tracks, and was used as a route to serve shippers along the line. SPT claims that its decision to subject the abandonment to the Commission's abandonment procedures was further motivated by SPT's concerns that a decision to retire the line without seeking Commission authority might ultimately be challenged, and SPT deemed to have effected an illegal abandonment.

NARPO, "in conjunction with Mr. Horace Robertson," repeats his allegation that the line is an exempt spur. NARPO also avers that the line's characteristics are consistent in all respects but one (the absence of connecting team tracks) with the McHenry spur criteria. NARPO points out that because the Ravenswood Branch is referred to as a spur in an April 26, 1989 agreement between SPT and District, SPT cannot repudiate the spur argument. District and SPT respond that the reference in the agreement is not determinative.

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[6] The reliance on Shoshone is misplaced, as that decision concerning an abandonment did not consider the spur issue.

DISCUSSION AND CONCLUSIONS

In determining whether a particular track segment is a line of railroad subject to our regulation under sections 10901-10906 or a spur exempt from such regulation under section 10907(b), we consider the intended use of the line. See Nicholson v. I.C.C., 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984). Although we have entry and exit jurisdiction over "track segments which are intended to be used to carry through trains between points of shipment and delivery," we do not have such jurisdiction over "track segments which are merely incidental to, and not required for, [a] railroad's service between points of shipment and delivery." Id., at 367. See Texas & Pac. Ry. v. Gulf, Etc. Ry., 270 U.S. 266 (1926); Illinois Commerce Commission v. United States, 779 F.2d 1270 (7th Cir. 1985).

In determining a line's intended use, we consider the line's history, physical characteristics, and use, taking into consideration such factors as traffic volume, whether service is regularly scheduled, whether stations are on the line, whether the line is constructed of light rail, and the number of shippers. See McHenry, 3 I.C.C.2d at 367-368; United States v. Idaho, 298 U.S. 105 (1936); New York Central R. Co. v. Chicago & Eastern Ill. R. Co., 222 F.2d 828, 830 (7th Cir. 1955).

The McHenry case concerned a 0.1-mile, stub-ended line segment that was sporadically used to serve a single shipper in interstate transportation. The shipper was responsible for maintaining the portion of the line lying on its own property. The track was constructed of light weight rail, was used to store cars, had no station, and was separated from the main line by exempt team tacks.

While none of these characteristics individually was determinative, considered together they indicated that the line was a spur and exempt from our abandonment jurisdiction under section 10903, et seq.

The Ravenswood Branch also has many of the characteristics of a spur: it is only 1.25 miles long; it is made of light weight rail; it is sub-ended; no through or overhead traffic moved over it;[7] and there are no stations listed on it.[8] SPT does not specifically refer to, nor does it conclusively refute, petitioner's allegation that the line was constructed for a lone shipper. It states that "it is unclear as to the number of shippers this line was originally intended to serve." SPT comments of July 30, 1990, p. 11. Indeed, SPT admits that the line "appear[s] to have served only one shipper in recent times." SPT comments of July 30, 1990, p. 9; see also V. S. Dixon, p. 3. Although SPT lists five industries allegedly served on the branch after it was extended and/or diverging industry tracks were added between 1916 and 1962,[9] it merely states that the traffic "presumably" moved in interstate commerce. No indication

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[7] SPT admits "the line has only been used to handle traffic to or from industries located on the line itself and it has never been possible for through trains and/or overhead traffic to make use of the line." SPT comments of July 30, 1990, V. S. Dixon, p. 6.

[8] SPT states that the station of "Ravenswood" is located on SPT's main line extending between Redwood Jct. and Newark, at milepost 30.9. This station is a main line point not affected by the proposed abandonment, and there are no stations on the track at issue.

[9] Our jurisdiction to regulate rail construction began in 1920. However, our records fail to show that SPT has ever sought authority from us to construct extensions to the Ravenswood Branch. This suggests that it may not have considered the Ravenswood Branch to be subject to our entry and exit jurisdiction.

is given that a substantial volume was moved. (Id. at 11; V. S. at 5.) Taking all these facts into consideration, we find that the Ravenswood Branch is a spur and exempt from our abandonment jurisdiction. Accordingly, we revoke SPT's use of the exemption under 49 CFR 1152.50.

The consummation question has been a principal focus of this proceeding. (See December 1989 and June 1990 decisions.) However, because we find here that the involved line is a spur track exempt from our abandonment jurisdiction, the consummation issue is now moot and will not be addressed further.

We are also revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C. 10903 or 10505. Because the track at issue here is a spur, we do not have such jurisdiction over it. We note, however, that the underlying right-of-way can be preserved under 16 U.S.C. 1247(d) without ICC authorization. The second sentence of section 1247(d) applies to "any established railroad rights-of-way" and the statute itself provides that their interim trail use "shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes."

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Southern Pacific Transportation Company's line segment extending approximately 1.25 miles between milepost 30.92 and milepost 32.17 at or near Ravenswood

is a spur track that is statutorily exempt from our abandonment jurisdiction under 49 U.S.C. 10907.

2. The use by Southern Pacific Transportation Company of the exemption procedures under 49 CFR 1152.50 for the abandonment of its Ravenswood Branch line in San Mateo County, CA is revoked.

3. The notice of exemption filed June 2, 1987, is dismissed for lack of jurisdiction.

4. The notice of interim trail use served December 15, 1989, is revoked.

5. This decision is effective on April 7, 1991.

IN THE SUPREME COURT OF PENNSYLVANIA

No. 86 WAP 2001

BUFFALO TOWNSHIP

Appellee,

V.

CARL E. JONES, KATHRYN L. JONES, LARRY TREADWAY, KASSIE TREADWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, MARGIE PURCELL,

Appellants.

APPLICATION FOR REARGUEMENT

APPEAL FROM THE ORDER AND DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA AT NO. 1875 C.D. 2000 PITTSBURGH, AFFIRMING THE ORDER OF THE COURT OF COMMON PLEAS OF BUTLER COUNTY AT NO. 00-5009, DATED JULY 31, 2000

William Claney Smith, Esq.
PA. I.D. 10956

7800 Perry Highway
Pittsburgh, Pa. 15237
Phone 412 366 0050

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED

THE COURT OVERLOOKED AND MISAPREHENDED THE ESTABLISHED RULE OF LAW AND *STARE DECISIS* OF

PENNSYLVANIA, THAT ACQUISITION OF A RIGHT OF WAY FOR RAILROAD PURPOSES UNDER THE POWER OF EMINENT DOMAIN, IS FOR THE *SPECIAL PURPOSE* OF OPERATING THE RAILROAD AND NO OTHER PURPOSE.

THE RAILROAD COULD NOT SELL THE RIGHT TO USE THE RIGHT OF WAY FOR A RECREATIONAL TRAIL AT THE TIME OF ITS ACQUISITION BY WESTERN PENNSYLVANIA RAILROAD UNDER THE GRANT BY THE LEGISLATURE, AND THEREFORE, CONRAIL DID NOT HAVE THE POWER TO GRANT A RIGHT TO BE USED FOR ANOTHER PURPOSE, A RECREATIONAL TRAIL, AFTER THE ACQUISITION BY CONRAIL, TERMINATION OF SERVICE AND SALE AND REMOVAL OF TRACKS, SATISFYING CONSUMMATION OF ICC ORDER AUTHORIZING ABANDONMENT.

ABANDONMENT IS NOT A FACTOR IN THE "SPECIAL USE" RULE, WHICH LIMITS THE USE TO THE ORIGINAL GRANT BY THE LEGISLATURE. "THE GRANTEE TAKES WHAT THE ACT GIVES AND NO MORE." Western Pennsylvania Railroad Company v. Johnston, 59 Pa. 290 (1868) (The same branch involved in this case.) EVEN IF THE COURT SUSTAINED THAT THERE WAS NO ABANDONMENT BUFFALO TOWNSHIP WAS PRECLUDED FROM USING THE RAILROAD AS A RECREATIONAL TRAIL.

THE COURT OVERLOOKED AND MISAPPREHENDED THE FACTS THAT RESULTED IN ABANDONMENT AND VESTING OF THE INTERESTS OF THE PROPERTY OWNERS, AND DREW ERRONEOUS CONCLUSIONS FROM THE FACTS. ABANDONMENT WAS CONSUMMATED ONE YEAR BEFORE ANY CONVEYANCE OF A DEED TO BUFFALO TOWNSHIP

THE COURT OVERLOOKED AND MISAPREHENDED THE FACTS AND THE LAW IN SUSTAINING THE FINDING OF FACT BY THE TRIAL COURT AND JUDGE PELLEGGRINI, THAT IT WAS NOT THE INTENT OF CONRAIL TO ABANDON THE RIGHT OF WAY.

THE COURT OVERLOOKED, MISAPPREHENDED, AND MISINTERPRETED THE LANGUAGE OF THE DEED AND CONRAIL RETAINED NO FUTURE INTEREST IN THE RIGHT OF WAY UNDER THE DEED OR THE SALES AGREEMENT THE DEED DOES NOT EXPRESSLY RETAIN THE RIGHT TO REENTER THE LAND FOR FUTURE RAILROAD USE.

THE COURT HAS OVERLOOKED AND MISAPPREHENDED THE FACTS AND THE LAW IN CONCLUDING IT IS NOT NECESSARY TO FOLLOW THE PROCEDURE ESTABLISHED UNDER THE PROVISIONS OF 16 U.S.A. 1247 (d) AND 49 C.F.R. 1152.29. IN ITS DECISION, THE COURT HELD THAT IT IS NOT NECESSARY TO COMPLY WITH THE RULES AND PROCEDURES ESTABLISHED FOR THE APPLICATION OF CREATING AN INTERIM TRAIL USE. THIS IS A

CASE OF FIRST IMPRESSION AND THE ISSUES WILL HAVE A SIGNIFICANT IMPACT UPON DEVELOPING LAW AND PUBLIC POLICY.

APPLICATION FOR REARGUMENT

The Defendant, Appellants, CARL E. JONES, KATHRYN L. JONES, LARRY TREADWAY, KASSIE TREADWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, MARGIE PURCELL, by their attorney WILLIAM CLANEY SMITH, ESQ., RESPECTFULLY PRESENTS THIS APPLICATION FOR REARGUMENT TO THIS HONORABLE COURT AND RESPECTFULLY SETS FORTH AS FOLLOWS:

The Court has overlooked and misapprehended key issues of fact and law which require and deserve reargument on these issues.

THE COURT EVERLOOKED AND MISAPPREHENDED THE ESTABLISHED RULE OF LAW AND *STARE DECISIS* OF PENNSYLVANIA, THAT ACQUISITION OF A RIGHT OF WAY FOR RAILROAD PURPOSES UNDER THE POWER OF EMINENT DOMAIN, IS FOR THE *SPECIAL PURPOSE* OF OPERATING THE RAILROAD AND NO OTHER PURPOSE.

THE RAILROAD COULD NOT SELL THE RIGHT TO USE THE RIGHT OF WAY FOR A RECREATIONAL TRAIL AT THE TIME OF ITS ACQUISITION BY WESTERN PENNSYLVANIA RAILROAD UNDER THE GRANT BY THE LEGISLATURE, AND THEREFORE, CONRAIL DID NOT HAVE

THE POWER TO GRANT A RIGHT TO BE USED FOR ANOTHER PURPOSE, A RECREATIONAL TRAIL, AFTER THE ACQUISITION BY CONRAIL, TERMINATION OF SERVICE AND SALE AND REMOVAL OF TRACKS, SATISFYING CONSUMMATION OF ICC ORDER AUTHORIZING ABANDONMENT.

ABANDONMENT IS NOT A FACTOR IN THE "SPECIAL USE" RULE, WHICH LIMITS THE USE TO THE ORIGINAL GRANT BY THE LEGISLATURE. "THE GRANTEE TAKES WHAT THE ACT GIVES AND NO MORE." Western Pennsylvania Railroad Company v. Johnston. 59 Pa. 290 (1868) (The same branch involved in this case.) EVEN IF THE COURT SUSTAINED THAT THERE WAS NO ABANDONMENT BUFFALO TOWNSHIP WAS PRECLUDED FROM USING THE RAILROAD AS A RECREATIONAL TRAIL.

The rights and interests acquired by the Western Pennsylvania Railroad Company in railroad rights-of way were defined by the Supreme Court of Pennsylvania an early case, Western Pennsylvania Railroad Company v. Johnston, 59 Pa. 290 (1868) which involved the *same railroad involved in this case*.

It is established in Western Pennsylvania Railroad Company v. Johnston, 59 Pa. 290 (1868), that the Western Pennsylvania Railroad was chartered under the General Railroad Law of 1849, P.L. 79, § 1, et seq.

The rights, title and interest which the Western Pennsylvania Railroad acquired under its charter, in the Butler Branch, part of its system, is clearly set forth by the Supreme Court of Pennsylvania as follows:

"This charter is founded upon the General Railroad Act of 1849. Unlike the laws under which the state constructed her public works, and by virtue of which she took a fee-simple estate in the land, the Act of 1849 confers only a right to survey and locate the route for a railroad, and to enter into and upon, and occupy all land on which its railroad, depots, &., may be located, with the proviso, "that before such company shall enter upon or take possession of any such lands or materials, they shall make ample compensation to the owner or owners therefor."

"The 11th section, which provides for the assessment of damages, restates substantially the nature of the use or occupancy in the same way. The character of the interest of the corporation in the land so taken and used for **railroad purposes** is thus clearly set forth in the law itself, but also received judicial recognition in numerous cases. **It is an easement merely upon the land, a right of way of passage, with such an occupancy as is necessary to give this right its effect; that is, in constructing, repairing and using the works adapted to the purpose of passage**. Lance's Appeal, 5 P.F. Smith 26, Spear v. Allison, 8 Harris 204; Shamokin Valley Railroad co. v. Livermore, 11 Wright 468, Mayor of Allegheny v. Ohio and Pennsylvania Railroad, 2 Casey 360-61. **This being the nature of the interest acquired by a railroad company in land appropriated for the use of its railroad, a mere easement or right of passage for a public purpose**."

The Supreme Court of Pennsylvania in Lazurus v. Morris, 212 Pa. 128, 61 A. 815, (1905), held that the appropriation of land under the power of eminent domain

does not give a fee simple estate in the absence of express statutory language to that effect but only a right to use and occupy the land for the specific purpose for which it is taken.

The Act involved in the Lazarus case provided for the use of eminent domain to procure sites for the erection of school houses, "and to use and occupy the same for the purpose of erecting thereon a schoolhouse. The Court held that when this use ceases the title reverts to the original owners.

The Court stated the rule as follows:

> "The right to take private property for this public use is asserted under the power of eminent domain. . . . It can only be called into operation by authority of the Legislature, and must be exercised in the manner, by the tribunal, and with the limitations provided by law . . . . **It therefore becomes necessary for any corporation, *public or private*, or individual claiming thereunder, asserting title under the power of eminent domain, *to point to the provisions of the act of assembly under which the power is asserted The grantee takes what the act gives, and no more*. If the act gives an absolute estate, and compensation is provided on this basis, the whole title may be acquired. If it only gives a right to use and occupy, the grantee only takes a conditional fee or easement terminable on the abandonment of the use for which the land was appropriated. The appropriation of land under eminent domain does not give a fee simple estate therein, in the absence of statutory language to that effect, but only a right to occupy and to use the land**

> **for the purpose for which it is taken**. Pittsburg etc. v. Bruce, 102 Pa. 23; Lance's Appeal, 55 Pa. 16, 93 Am.Dec. 722; Pennsylvania Schuylkill Valley RR. Company v. Paper Mills, 149 Pa. 18, 24 Atl 205. ***The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right and the rule is that such authority must be strictly construed***.
>
> Dwarris on Statutes, 750; Mayor, etc of Allegheny v. O. & P. Railroad Company, 26 Pa. 355; Commonwealth v. Erie & N.R. Co. 27 Pa. 339, 67 Am. Dec. 471." Lazarus v. Morris, 212 Pa. 128, 131, 61 A. 815, 816.
>
> "it is clear the School district of Hanover township only acquired the right to use and to occupy the land in dispute for school purposes . . . . **But whatever kind of estate, or easement the school district acquired *terminated when it ceased to be used for the purpose for which the land was appropriated, and the title reverted to the original owner or those who hold under him***." Lazurus v. Morris, 212 Pa. 131, 61 A. 816.

In Lances Appeal, 55 Pa. 16 (1866), in an opinion involving a railroad right of way obtained under the power of eminent domain, the Supreme Court held as follows:

> "after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking. . .
>
> ". . . .

> The exercise of the right of eminent domain whether directly by the state or its authorized grantee is necessarily in derogation of private right and the rule in the case is, that the authority is to be strictly construed: Dwarris on Stat. 750; 2 Casey 355; 3 Id. 339; 7 Harris 211. **What is not granted is not to be exercised**. When therefore, the Lackawanna and Bloomsburg Railroad Company, under its charter, and the promoter of the private railroad under the Act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of the right. **They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner, and outside of the authorized use, which must be public or incidental to the public use, the proprietary use is in the original owner**." (Emphasis supplied.) 55 Pa. 16, 23

In a case where the original exercise of eminent domain was for the purpose of constructing a canal, the Supreme Court held that the termination of the use for canal purposes terminated the right of way or easement and that the right of way was not conveyed to a railroad by a sale to the railroad to use for railroad purposes.

In Pittsburgh & Lake Erie Railroad Company v. Bruce, 102 Pa. 23 (1872), the Supreme Court of Pennsylvania sustained and adopted the Opinion of the lower Court and held:

> "The rights given the company 'to enter upon, take possession of and use' lands necessary

for the purposes of the canal are no higher that the right 'to enter upon and into, and occupy' lands given by **the general railroad law of 1849**, under which a corporation **only takes an easement in the land**: Western Pennsylvania Railroad Co. v. Johnston, 59 P.S.R. page 290.

". . . .

". . . . **no power is given to them to dispose of any lands taken in an adverse manner** lands and waters necessary for the purpose of the canal must be held and applied thereto. . . .

". . . it seems to us very plain that the canal company only took an easement in the land of Thomas Bruce. . . .

"[W]henever the law has given a person or a company right to enter upon the land of another **for a *special purpose*, and such person or company enters for a *different purpose* not authorized by law, he or they will be regarded as trespassers** and may be sued as such by the owners of the land.

"We hold, therefore, that the defendants have shown no authority from the legislature of Pennsylvania for their entry on the land of the Plaintiffs. (Emphasis supplied.) 102 Pa. 23, 26, 27.

Justice Gordon, further held that:

"**Corporations take those powers which are conferred upon them by the legislature and nothing more**.

". . . .

> "**There was, then, in this company but a possession and use, in other words a right of way, and that *for a single purpose*, the construction and maintenance of a canal, and when the canal was abandoned the use and occupation of the land reverted to the owner of the fee**: Jessup v. Loucks, 5 P.F.S. 350. It follows **the possession having thus *revested* in the owner he may maintain any action that is necessary to regain his rights or to protect his property**: Ridge Turnpike v. Stoever, 6 W.&S. 379." Pittsburgh & Lake Erie Railroad Company v. Bruce, 102 Pa. 23, 30 (1872) (Emphasis supplied.)

In Pittock v. Central District & Printing Telegraph Company, 31 Pa. Super. 589 (1906), a railroad acquired a right of way across a farm by a condemnation proceeding, under the provisions of the **Railroad Act of February 19, 1849**. The railroad subsequently authorized the **Telegraph Company to erect 10 poles on the right of way**. The Court sustained an action for trespass and held that:

> "All that was taken from the appellee when the railroad was located across his farm was **the use and possession of his land for railroad purposes**. His estate in and control over his property has only been diminished to that extent. The absolute exclusive and uncontrolled occupancy of the railroad company goes no further." 31 Pa. Super. 589, 592 (Emphasis supplied.)

THE COURT OVERLOOKED AND MISAPREHENDED THE FACTS THAT RESULTED IN ABANDONMENT AND VESTING OF THE INTERESTS OF THE PROPERTY OWNERS, AND DREW ERRONEOUS CONCLUSIONS FROM THE FACTS. ABANDONMENT WAS

CONSUMMATED ONE YEAR BEFORE ANY CONVEYANCE OF A DEED TO BUFFALO TOWNSHIP

Judge, O'Brien and Judge Pellegrini both accepted the following facts:

On June 18, 1987, Conrail requested approval from the ICC to abandon the Butler Branch pursuant to 45 U.S.C. 748.

On September 14, 1987, the ICC issued a Certificate and Decision approving Conrail's request to abandon the Butler Branch

Conrail terminated rail service prior to December 31, 1987.

Conrail sold rails and ties to B. Sykes, Ltd. in spring of 1990.

B. Sykes, Ltd removed the rails and ties from the Butler Branch in spring of 1990.

On June 7, 1990, On June 7, 1990 Buffalo Township requested an Interim Trail Use from the ICC .

The ICC responded and requested Buffalo Township to respond to whether the abandonment had been "consummated." (R. 373a-379a)

Buffalo Township then withdrew its request for an ITU.

The ICC acknowledged Buffalo Township's decision to withdraw its request.

One year from the removal of the rails by B. Sykes Ltd., Buffalo Township received a quitclaim deed from B. Sykes, Ltd. on **June 14, 1991**.

> Buffalo Township did not enter into a Trail Agreement with Conrail which was not cooperative in this matter in June of 1990. (Testimony of Mr. Roenigk)
>
> There is no evidence that a trail agreement was ever entered into with any private or public body, incorporating the requirements of the Rail to Trail Act. (Record)

It is respectfully submitted to the Court that in June of 1990, upon the sale and removal of the rails, that the abandonment had been consummated, and that this was further acknowledged by Buffalo Township in its withdrawal of the request for a Trail Permit, when questioned by the ICC. It is further supported by the minutes of the meeting and testimony of Mr. Roenigk acknowledging that the request for withdrawal of the ITU request was that the sale and removal of the rails consummated abandonment, by June of 1990. Conveyance by Quitclaim deed did not occur until June of 1991.

THE COURT OVERLOOKED AND MISAPPHREHENDED THE FACTS AND THE LAW IN SUSTAINING THE FINDING OF FACT BY THE TRIAL COURT AND JUDGE PELLEGGRINI, THAT IT WAS NOT THE INTENT OF CONRAIL TO ABANDON THE RIGHT OF WAY.

First, the quitclaim deed was issued in June of 1991, **one year after the consummation of the abandonment by the sale and removal of the rails by June of 1990**. Secondly, Conrail continued to proceed under the request to the ICC to ***abandon***, rather than to ***Suspend*** (discontinue) the operation of the line. The proceedings **continued** as an abandonment request rather than as a

request for suspension. Conrail did not change the request before the ICC, and in fact had refused to join with Buffalo Township in the application for an Interim Trail Use in June of 1990. The refusal of joinder in the application for trail use in June of 1990, is consistent with the intent to abandon and inconsistent with the intent to retain a future interest. The continuing of Conrail to rely upon the Abandonment Order of the ICC and failure to request that the proceeding be reopened and changed to a request for discontinuance, is inconsistent with an intent not to abandon.

The time is limited under the ICC rules and practice, in which Conrail or Buffalo Township could request a reopening of the abandonment Order and proceeding for an ITU, or discontinuance, and had expired before June of 1990, and also before the deed of June 1991. The purpose of the reorganization and the Reorganization Act was to relieve Conrail of financial liabilities and responsibilities by eliminating lines. Failure to request a reopening of the procedure and the Order and changing it to include an Interim Trail Order or a discontinuance of operation with the right to reinstate operation, is inconsistent with the intent to abandon. The attempt to pass the title through a third party, B. Sykes Ltd, is consistent with the recognition of abandonment and a recognition that the abandonment had been consummated. The failure of Conrail to Petition to reopen to change to a suspension of operation, and the refusal to join in a late filed request for an Interim Trail Use is the best evidence of Conrails continued intent to abandon and inconsistent with the fact finding that Conrail did not intend to abandon.

The Commonwealth Court in Judge Pellegrinni's Opinion also relied upon an attempt to maintain access to

real estate, not sold but retained, at Mile Post 0.6, which was retained by the railroad for future sale. The properties not sold with the right of way would otherwise be left landlocked without the reservation which was limited in use "for access to and from a public street." (Judge Pellegrinni Opinion, p.8) This fact of attempting to retain access to remaining property is not evidence of intent not to abandon, but only evidence of intent to preserve access and value for the remaining property. Further, it is submitted that the attempt to obtain or retain access to a public street, is evidence of Conrail's recognition that its acts constituted consummation of the abandonment. The Court's consideration of the evidence concerning access of the property at Mile Post .06, is an error and also a nonsequitor.

There is no logical relationship or nexus between reserving access to the nearest public street for a property that would otherwise be landlocked, and intending not to abandon a 21 mile railroad right of way. In fact it is evidence of acknowledgement that, otherwise, the abandonment might, without "Excepting and Reserving," landlock the property. If Conrail had no intention to abandon, it would have no need to "Except and Reserve."

All of the evidence introduced by the Defendant Appellants, meets every example of abandonment in the state of Pennsylvania. The same evidence, including the sale and removal of the rails meets the abandonment consummation, recognized by the ICC and STB. The facts relied upon by Judge O'Brien and Judge Pellegrinni, and accepted by the Supreme Court do not have a nexus to intent, are contrary to the weight of the evidence, and are also equally supportive of the intent to abandon. The reservation of access to a public road at the M.P. .06, has

no rational probative value on the issue. It is equally consistent or more consistent with an intent to abandon.

The remaining paragraph on which the Court relies is inconsistent with the rules and practice before the ICC to obtain a suspension of service, or an Interim Trail Use which considers the proper practice a Motion or Petition to reopen the Order and either request an ITU or change "Abandonment" to "Suspension." Conrail cannot avoid the Rules and practices, and Order of the ICC by ***four years later*** (1987-1991), and one year after consummation (sale and removal of rails) (1990-1991), adding a paragraph to a quitclaim deed.

CONRAIL RETAINED NO FUTURE INTEREST IN THE RIGHT OF WAY UNDER THE DEED OR THE SALES AGREEMENT

The opinion of Judge Pellegrinni sets forth the paragraph upon which he concluded that Conrail intended to retain an interest in the right of way:

> ". . . . The Grantee agrees that such activities shall be conducted ***only on such terms and conditions*** as Grantor and Grantee hereto may hereafter ***may mutually agree*** upon in writing and grantor shall not be called upon to operate its cars, engines or ***on any Part of the land hereinbefore described or to accept any obligation*** unless they are in a ***written agreement*** between Grantor and Grantee hereto." Opinion of Judge Pellegrinni at page 9.

The opinion of Justice Cappy, speaking for the majority of the Court recognized that:

"Conrail took certain action that suggested an intent to abandon the railroad line, such as filing a request to abandon rail service with the ICC and entering into an agreement with B. Sykes for salvage of the rails. However, Conrail took other steps evidencing the contrary intent, such as participating in ongoing negotiations with Buffalo Township for the use of the land and ***expressly retaining the RIGHT to REENTER the land for future railroad use in the deed***." Opinion p. 8.

THE DEED DOES NOT EXPRESSLY RETAIN THE RIGHT TO REENTER THE LAND FOR FUTURE RAILROAD USE.

The language of the paragraph in the deed creates no ***RIGHTS*** in Conrail, to enter the land. Under the language in the deed Conrail only gets the opportunity to engage in negotiations for an arms length transaction involving use of equipment and land. There is no enforceable contractual ***right*** retained by Conrail to use the right of way in the future. Both Judge Pellegrinni and Justice Cappy overlooked, misapprehended, and misinterpreted the language in the deed, which is the keystone of both of their Opinions that Conrail intended to retain an interest in the railroad right of way, and therefore there was no abandonment of the right of way.

The paragraph relied upon states that the "activities" referred to (uses and operation of railroad equipment on the right of way)" ***shall be conducted only on such terms and conditions as Grantor and Grantee hereto MAY hereafter MAY MUTUALLY AGREE UPON. . . .***" There is no language of ***RIGHT*** in this phrase. Conrail did not gain a ***RIGHT OF REENTRY*** it only obtained the

opportunity, as any other person would have, to attempt to obtain the use involved in an arms length transaction, with no obligation on the part of the Grantee to agree.

The language also mandates that there must be a "***written agreement***." Therefore, any rights would arise out of any new written agreement, not the deed. "***THERE IS NO RIGHT OF REENTRY GRANTED OR RESERVED TO CONRAIL IN THE DEED***. In fact and law the language of the deed specifically excludes and future usage of the right of way without a future written agreement to which there is mutual agreement.

There is no "***RIGHT OF REENTRY***" reserved to Conrail in the deed, further the language provides that there is no "***obligation***" on the part of Conrail to operate cars or engines on the land. Reciprocally, there is no "***obligation***" on the part of the Grantee to permit the operation of cars and engines on the right of way.

There is no enforceable contractual ***right*** retained by Conrail to use the right of way in the future. Both Judge Pelegrinni and Justice Cappy overlooked, misapprehended, and misinterpreted the language in the deed, which is the keystone of both of their Opinions, that Conrail intended to retain an interest in the railroad right of way, and therefore there was no abandonment of the right of way.

The Butler Branch has been abandoned by the actions subsequent to the ICC Abandonment Order, including the sale and removal of rails, and no future interest or future right of reentry was retained by Conrail.

The Court of Common Pleas, the Commonwealth Court, and the Supreme Court have erred in finding that

Conrail retained a future right of reentry in the right of was evidence of intent not to abandon. All of the remaining evidence including the sale and removal of rails establishes the consummation of the abandonment, no later than the sale and removal of rails.

THE COURT HAS OVERLOOKED AND MISAPPREHENDED THE FACTS AND THE LAW IN CONCLUDING IT IS NOT NECESSARY TO FOLLOW THE PROCEDURE ESTABLISHED UNDER THE PROVISIONS OF 16 U.S.A. 1247 (d) AND 49 C.F.R. 1152.29, IN ITS DECISION, THE COURT HELD THAT IT IS NOT NECESSARY TO COMPLY WITH THE RULES AND PROCEDURES ESTABLISHED FOR THE APPLICATION OF CREATING AN INTERIM TRAIL USE. THIS IS A CASE OF FIRST IMPRESSION AND THE ISSUES WILL HAVE A SIGNIFICANT IMPACT UPON DEVELOPING LAW AND PUBLIC POLICY.

Congress provided in 16 U.S. C. 1247 (d) for the creation of recreational trails when there is a railroad right of way abandonment proceeding. 49 C.F.R. 1152.29 provided a procedure for applicant participation in hearings where the applicant wanted to create a trail.

The Supreme Court held that it is not necessary to apply for an Interim Trail Use in the procedure before the ICC, so long as the proposed trail operator complies with the other requirements of the Act.

The Supreme Court Opinion was based on a decision which was totally dicta, and in which the ICC did not have Jurisdiction. The Supreme Court of the U.S. has already

decided that creation of a trail under the Rail to Trail Act is compensable as a taking.

This decision on this issue is of first impression and will have extensive impact in the Federal Courts and in the state courts where interim trails are created under this act. Applicants suggest that this Honorable Court has erred and the Court has overlooked and misapprehended the facts and the law.

Respectfully submitted,

William Claney Smith, Esq.
Attorney for Appellants

[J-24-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BUFFALO TOWNSHIP,	:	No. 86 WAP 2001
Appellee	:	Appeal from the Order of the Commonwealth Court entered June 14, 2001, at No. 1875CD2000, affirming the Order of the Court of Common Pleas of Butler County, Civil Division, entered July 31, 2000, at No. 00-50009.
v.	:	
CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL AND MARGIE PURCELL,	:	778 A.2d 1269 (Pa. Commw. 2001)
Appellants	:	ARGUED: March 6, 2002

OPINION

MR. JUSTICE CAPPY

DECIDED: DECEMBER 31, 2002

In this appeal, we consider whether the trial court properly granted a permanent injunction in favor of Appellee, Buffalo Township, prohibiting Appellants from interfering with Buffalo Township's recreational trail along a 20.7-mile right-of-way formerly known as the Butler Branch of the railroad that was operated by the Consolidated Rail Corporation (hereafter "Conrail"). The Commonwealth Court affirmed the trial court's order. For the reasons stated herein, we affirm the lower courts' grant of the permanent injunction in favor of Buffalo Township.

In the late 1860's, the Western Pennsylvania Railroad Company (which subsequently became part of Conrail) constructed a branch line known as the Butler Branch that ran between Freeport, Armstrong County and Butler, Butler County. During construction, the railroad obtained rights-of-way and easements over privately owned property through condemnation proceedings and right-of-way agreements.

On October 31, 1985, Conrail notified the Interstate Commerce Commission[1] (hereafter "ICC") of its intent to file an application to abandon the Butler Branch due to insufficient revenue. On June 8, 1987, Conrail filed a request for approval of abandonment of the Butler Branch with the ICC. On September 14, 1987, the ICC issued a certificate and decision authorizing Conrail to abandon the Butler Branch.

In the early spring of 1990, B. Sykes Limited (hereafter "B. Sykes"), a salvage company, purchased the rails and ties along the right-of-way from Conrail and removed these rails and ties. Conrail and Buffalo Township also filed a request for interim trail use pursuant to 49 C.F.R. § 1152.29(a) with the ICC. However, they withdrew this petition on September 12, 1990, after the ICC informed Conrail and Buffalo Township that it needed further information on whether Conrail had consummated abandonment of the subject property. On June 11, 1991, Conrail

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[1] The Surface Transportation Board ("STB") assumed all of the functions of the ICC as of January 1, 1996. 49 U.S.C. § 702. Throughout this opinion and for ease of reference, we refer to the agency as the ICC since at the time of the transfer of the property the STB was still known as the ICC.

conveyed by quitclaim deed all of its rights, title and interest in the property to B. Sykes.[2] In turn, on June 14, 1991, B. Sykes conveyed its interest to Buffalo Township by quitclaim deed. Conrail reserved the right to reenter the land in both of the deeds. *See* Plaintiff's Exhibits 1 & 2.

In 1992, Buffalo Township began to develop the former railroad property as a recreational trail pursuant to the Pennsylvania Rails to Trails Act (hereafter "State Act"), 32 P.S. § 5611 et seq. and the National Trails System Act (hereafter "National Act"), 16 U.S.C. § 1241 et seq. Shortly thereafter, certain property owners along the right-of-way, Appellants herein, erected barriers to prevent passage on the newly developed trails asserting that Conrail had abandoned the right-of-way and thus, the right-of-way reverted to them. Buffalo Township then filed a complaint in equity in the Court of Common Pleas of Butler County and simultaneously filed a preliminary injunction seeking to enjoin Appellants from erecting barriers on its land.

On May 5, 2000, the trial court granted the preliminary injunction, preventing Appellants "from blocking, obstructing, threatening, intimidating, or coercing agents and employees of the Township of Buffalo or individuals using the Butler-Freeport Community Trail . . . ." Memorandum Opinion and Order of Court dated July 31, 2000. On July 31, 2000, the trial court entered a final or permanent

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[2] Appellants do not raise any challenge based upon the intermediate transfer from Conrail to B. Sykes. Thus, the effect of that intermediate transfer on the ultimate question of Buffalo Township's present property interest is not before this court.

injunction[3] preventing Appellants from denying access to the trail in any manner. The trial court filed an opinion in support of its order. The court explained that Appellees demonstrated a clear right to relief, since Conrail did not abandon the railway. Further, under the National Act, a conversion of property from a railroad to trail use did not constitute abandonment. Accordingly, Buffalo Township properly acquired Conrail's interest in the property.

On appeal, the Commonwealth Court affirmed. *Buffalo Township v. Jones et al.*, 778 A.2d 1269 (Pa. Commw. 2001). The court deferred to the trial court's determination that Conrail had not abandoned the right-of-way, concluding that Appellants could not meet their burden of demonstrating that the lower court abused its discretion. Additionally, the court held that Buffalo Township was not required to obtain ICC approval for the interim trail use so long as it in fact complied with the requirements of the National Act. Accordingly, the Commonwealth Court determined that the trial court's order granting "injunctive relief enjoining Property Owners from interfering with the public's use of the trail was appropriate." *Id.* at 1277.

This court granted allowance of appeal to consider whether the trial court properly granted a permanent injunction to Buffalo Township.

Appellants argue that Conrail abandoned the right-of-way prior to the transfer of the property to Buffalo Township via a quitclaim deed. According to Appellants, Conrail

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[3] Courts refer to the injunction as either final or permanent.

abandoned the property either when it filed a certificate of abandonment with the ICC or when it authorized salvage of the railroad tracks. Thus, Conrail had abandoned its interest in the property prior to the time it transferred its "interest". Alternatively, upon transfer of the property, Conrail abandoned the property since its interest in the property was limited solely to railroad purposes. Further, Appellants maintain that the lower courts improperly relied upon the National Act in determining that the property was not abandoned, since Conrail and Buffalo Township did not comply with the requirements of the National Act, and thus, that Act cannot preserve the transfer of the property to Buffalo Township. Accordingly, Appellants conclude that the property reverted to them under common law and the lower courts erred in granting the injunction in favor of Buffalo Township. Finally, Appellants assert that even if the property was not abandoned, the lower courts improperly granted the injunction, since Buffalo Township did not establish either a need for immediate relief or irreparable harm. Additionally, Appellants conclude that the trial court erred in failing to refer the abandonment issue to a jury.

Buffalo Township responds that the land was not abandoned at the time of the quitclaim deed, thus Conrail properly transferred its interest in the property. Further, the National Act and the State Act allows the transfer of the property. Alternatively, Buffalo Township offers that case law from Pennsylvania allows a railroad company to transfer the land to further a public use or purpose. In this case, the transfer served such purpose and thus, the property did not revert to the underlying landowners.

Initially, we note that in order to establish a claim for a permanent injunction, the party must establish his or

her clear right to relief. *See Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc.,* 676 A.2d 695, 699 (Pa. Commw. 1996). However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court "may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." *Soja v. Factoryville Sportsmen's Club,* 522 A.2d 1129, 1131 (Pa. Super. 1987). Additionally, when reviewing the grant or denial of a final or permanent injunction, an appellate court's review is limited to determining whether the trial court committed an error of law.[4]

In order to address Appellants' claims in this matter, we must first consider the nature of the property interest

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[4] The intermediate courts have expressed that the standard of review for the grant or denial of a permanent injunction is whether the trial court abused its discretion or committed an error of law. *See Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc.,* 676 A.2d 695, 699 (Pa. Commw. 1996); *Licensed Beverage Ass'n. of Philadelphia v. Bd. of Educ. of the School District of Philadelphia,* 669 A.2d 447, 449 n.3 (Pa. Commw. 1995). These courts have imported this standard of review from reviewing the grant or denial of a preliminary injunction. However, as noted above, the test for the issuance of the two types of injunctions is not the same. While we do not question the standard as it relates to preliminary injunctions, we do not agree that this standard is appropriate for permanent injunctions. Ultimately, the grant or denial of a permanent injunction will turn on whether the lower court properly found that the party seeking the injunction established a clear right to relief as a matter of law. This inquiry involves a legal determination by the lower court. Accordingly, we think it proper that appellate review in these cases is whether the lower court committed an error of law in granting or denying the permanent injunction. Our standard of review for a question of law is de novo. *Seven Springs Farm, Inc. v. Croker,* 801 A.2d 1212, 1216 n.1 (Pa. 2002). Our scope of review is plenary. *See ODC v. Jepsen,* 787 A.2d 420 (Pa. 2002).

of the parties and whether Conrail abandoned its property interest under state law.[5] The common law provided that the property interest reverted to the grantor or the grantor's successors upon abandonment of a railroad right-of-way. *See Brookbank v. Benedum-Trees Oil Co.,* 131 A.2d 103, 112 (Pa. 1957); *Quarry Office v. Philadelphia Electric Co.,* 576 A.2d 358, 363 (Pa. Super. 1990). "[A]n estate in reversion is the residue of an estate left to the grantor, to commence in possession after the determination [6] of some particular estate granted out by him." *Smith v. Glen Alden Coal Co.,* 32 A.2d 227, 234 (Pa. 1943) (citing Blackstone, Vol. 2. § 176). A reversionary interest is used to define the interest that a person has in the reversion of property. *See* BLACK'S LAW DICTIONARY 1186 (5th Edition 1979). It is the right to "the future enjoyment of property, at present in the possession or occupation of another." *Id.* Thus, upon the determination of the railroad's estate, i.e., abandonment of

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[5] Both parties cite federal law in support of their positions. However, our inquiry is directed at whether Conrail's property interest in the right-of-way reverted to Appellants. "State law generally governs the disposition of the reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments, and to impose conditions affecting postabandondment use of the property." *Preseault v. ICC et al.,* 494 U.S. 1, 8 (1990); *see e.g. Chatham v. Blount County,* 789 So.2d 235, 241 (Ala. 2001). In other words, the ICC has jurisdiction to make determinations regarding abandonment of the railroad line and conditions placed upon such abandonment and thus, such decisions are subject to federal law. However, state law controls the disposition of the underlying property interest. *See* Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?* 26 COLUMBIA J. ENVTL. L. 399, 446-47 (2001).

[6] Determination is defined as "[t]he ending or expiration of an estate or interest in property." BLACK'S LAW DICTIONARY 405 (5th Edition 1979).

the right-of-way by the railroad, the property would "revert" to the landowner.

In evaluating whether the user abandoned the property, the court must consider whether there was an intention to abandon the property interest, together with external acts by which such intention is carried into effect. *Lawson v. Simonsen,* 417 A.2d 155, 160 (Pa. 1980); *see also Burnier v. Dep't of Envtl. Resources,* 611 A.2d 1366, 1368 (Pa. Commw. 1992). In order to establish the abandonment of a right-of-way, the evidence must show that the easement holder intended to give up its right to use the easement permanently. *Thompson v. R.R. Preservation Society,* 612 A.2d 450, 453 (Pa. Commw. 1992). "Such conduct must consist of some *affirmative act* on his part which renders use of the easement impossible, or of some *physical obstruction* of it by him in a manner that is inconsistent with its further enjoyment." *Id.* (emphasis in original); *see also Piper v. Mowris,* 351 A.2d 635, 640 (Pa. 1976). Mere nonuse by the railroad does not amount to abandonment. *Lawson,* 417 A.2d at 160; *see also Burnier, supra.*

In determining the intent of the parties, the intermediate courts have considered a myriad of factors. For example, in *Birdsboro Municipal Auth. v. Reading Co. and Wilmington & Northern R.R.,* 758 A.2d 222, 227 (Pa.Super. 2000), the court held that a mere failure to maintain and repair existing tracks did not amount to an intent to abandon. In *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.,* 612 A.2d 450, 454 (Pa.Super. 1992), the court held that evidence that the railroad company entered into salvage agreements and quitclaimed its interest in the subject property should be submitted for the factfinder to resolve the railroad's intent to abandon. Courts in this Commonwealth have also indicated that the

filing of a certificate of abandonment with the ICC or PUC demonstrated intent to abandon, but cautioned that in order to justify a finding of abandonment, the filing of the certificate must be coupled with external acts in furtherance of abandonment. *Chew v. Commonwealth,* 161 A.2d 621, 624 (Pa. 1960); *Lacy v. East Broad Top Railroad & Coal Co.,* 77 A.2d 706, 710 (Pa. Super. 1951); *see also Thompson, supra.*

In sum, many different factors can be considered when making a determination of abandonment. Moreover, no single factor alone is sufficient to establish the intent to abandon. Abandonment must be determined based upon all of the circumstances surrounding the alleged abandonment.

Turning to the instant case, we must consider whether the trial court's decision that Conrail did not abandon its property interest in the subject property was reasonable.[7] In ascertaining Conrail's intent, the trial court examined all the circumstances surrounding the alleged abandonment. In this case, Conrail took certain action that suggested an intention to abandon the railroad line, such as

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[7] The parties do not dispute the equity court's findings of facts. Rather, Appellants argue that those facts, taken in their entirety, amount to abandonment. Questions of abandonment are heavily fact-driven decisions. *Lawson,* 417 A.2d at 159-60; *Thompson,* 612 A.2d at 453. In reviewing fact-laden decisions, an appellate court displays a high level of deference to the trial court as the fact finder. *See, e.g.,* Martha Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking,* 2 J. APP. PRAC. & PROCESS 47 (Winter 2000). Accordingly, our standard of review regarding an issue of abandonment is whether "a judicial mind, on due consideration of all the evidence, as a whole, could reasonably have reached the conclusion of that tribunal." *Aiken Indus., Inc. v. Estate of Wilson,* 383 A.2d 808, 810 (Pa. 1978).

filing a request to abandon rail service with the ICC and entering into an agreement with B. Sykes for salvage of the rails. However, Conrail took other steps evidencing the contrary intent, such as participating in ongoing negotiations with Buffalo Township for the use of the land and expressly retaining the right to reenter the land for future railroad use in the deed. Ultimately, the trial court was persuaded by these latter factors and concluded that Conrail did not abandon the right-of-way. In fact, these latter factors demonstrated Conrail's intent to *retain* an interest in the right-of-way. Accordingly, on due consideration of all of the evidence, we find that the equity court reasonably concluded that Conrail did not abandon the Butler Branch. *See Aiken, supra* n. 6.

Having concluded that Conrail did not abandon its interest in the property prior to the transfer of the property to Buffalo Township, we must address Appellants' argument that upon transfer of the property to an entity that was not a railroad company the property reverted to Appellants. Appellants' argument is premised on Buffalo Township's withdrawal of its interim trail use application with the ICC. According to Appellants, formal ICC authorization was necessary to transfer the property for a non-railroad purpose.[8]

In order to place Appellants' argument in context, we must first provide some background of the relevant pieces of legislation and the purpose for the legislation.

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[8] In this case, the question of whether Conrail's right-of-way was limited to railroad purposes is a question of law. Accordingly, our standard of review is de novo and our scope of review is plenary. *See* supra n. 4.

In *Preseault v. ICC et al.*, 494 U.S. 1, 5-6 (1990), the Court was faced with a challenge to the constitutionality of the National Act under the Takings Clause of the United States Constitution. U.S. Const. amend. V. By way of background, the Court first traced the history of the National Act. The Court explained that Congress was motivated to preserve the loss of railroad lines across the United States[9] and enacted the Railroad Revitalization and Reform Act (hereafter "Reform Act") in 1976.[10] The Reform Act encouraged the conversion of railroad tracks to recreational trails. *Id.* However, the Reform Act was unsuccessful in furthering this purpose and in response thereto, in 1983, Congress enacted amendments to the previously enacted National Act, including the addition of subsection (d) to 1247 of the National Act.[11] *Id.* at 6-7. This subsection sought to "preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." 16 U.S.C. § 1247(d). In order to accomplish this purpose, the subsection provided that:

> in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to

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[9] In 1920, the Nation's railroad track reached its peak of 272,000 miles of track. By 1990, only about 141,000 miles were in use, and experts predicted that the amount of track would decrease by 3,000 miles per year through 2000. *Preseault,* 494 U.S. at 5.

[10] The original version of the National Act was enacted in 1968 and known as the National Trails System Act.

[11] Congress noted that the amendments may be cited as "National Trails System Act Amendments of 1983." 16 U.S.C. § 1241, History.

> restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d). Thus, the effect of this subsection was to deem certain interim trail use a "discontinuance" as opposed to an "abandonment," which had the effect of preventing "property interests from reverting under state law." *Preseault,* 494 U.S. at 8. Ultimately, the Court held this provision constitutional.

Pennsylvania, following the federal lead, enacted the State Act, effective ninety days after December 18, 1990.[12] 32 P.S. § 5611. This legislation gave the Department of Environmental Resources the authority to participate in rails to trails conversions for the purpose of developing "available railroad rights-of-way for public recreational use." 32 P.S. § 5613. The State Act also gave counties or municipalities the right to "accept title to available railroad rights-of-way conveyed by quitclaim deed or warranty deed." 32 P.S. § 5614(c)(2).

Both the National Act and the State Act display a strong legislative policy encouraging the preservation of railroad rights-of-way by using existing rights-of-way for interim recreational trail use. The National Act accomplishes this directly by providing that "interim trail use" is a "discontinuance" rather than an "abandonment" of the

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[12] The date the State Act became effective was prior to the transfer of the property to Buffalo Township, thus we may consider the State Act in reviewing the validity of the transfer to Buffalo Township.

prior railroad use, thus preventing the right-of-way from reverting under state law. *Preseault.* The State Act demonstrates its intent by giving counties and municipalities the right to accept title to the railroad rights-of-way. The inescapable effect of these Acts is to allow a railroad company to transfer its possessory interest in the land, i.e., the right-of-way, to a third party for the limited purpose of interim recreational trail use. The interim trail user essentially holds the railroad company's land in trust until the railroad needs to reactivate service on the rail line. In this way, the legislature has effectively prevented the further loss of railroad track. *See Preseault supra.* Thus, upon the conversion of a railroad line to a recreational trail, the railroad's right-of-way does not terminate but is held in abeyance, and thus, the land does not revert to the property owner.

Keeping these general principles in mind, we now turn to Appellants' specific argument. Appellants insist that the only way the National Act could preserve the right-of-way was if Buffalo Township filed an interim trail use application with the ICC. In the absence of formal ICC authorization, the property reverted to Appellants pursuant to the common law. Appellants find support for their argument in the language of the National Act and the ICC regulations. *See* 49 C.F.R. § 1152.29.

Before beginning our analysis of Appellants' argument, we must point out that we are unable to find any case law on point with the instant case, since the proposed trail user normally files an interim trail use application with the ICC. Thus, we will first set forth the pertinent portion of the statute and regulations and then look at case law, which has spoken to the statute and regulations

in other contexts, to aid us in addressing Appellants' argument.

The relevant portion of section 1247(d) states that:

> If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board **shall impose such terms and conditions** as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. § 1247(d) (emphasis added). Additionally, the ICC regulations provide that if the proposed trail user intends to acquire a rail line for interim trail use, "it must file a comment or otherwise request in its filing [with the ICC] . . . indicating that it would like to do so." 49 C.F.R. § 1152.29(a). The regulations set forth the required information for any interim trail use application and provide the relevant time limits for the application process. 49 C.F.R. § 1152.29(a)(1)-(a)(3) and (b)(1).

Appellants argue that the statutory language, indicating that the ICC can impose terms and conditions on any transfer, implies that the ICC must sanction the transfer in order for it to be effective. However, as noted by the Commonwealth Court in this case, there is nothing in the language of the statute requiring a trail owner, such as Buffalo Township, to comply with the ICC regulations. *Buffalo Township,* 778 A.2d at 1276. The language in the statute referring to "terms and conditions," 16 U.S.C.

§ 1247(d), merely relates to the managerial, financial, and legal responsibility of the trail user and clarifies the obligations that the interim trail user must fulfill in order for the trail conversion to occur. However, this language does not impose any filing obligation on the trail user; rather, any requirement of formal ICC intervention is merely by implication. We refrain from reading such a requirement into the statute where the language of the statute itself does not make such a requirement mandatory for trail conversion.

Further support for our conclusion is provided by a decision of the ICC.[13] In 1991, the ICC entertained the issue of whether a railroad spur was subject to its regulation. *Southern Pacific Transportation Co., Exemption,* 1991 WL 108272 (I.C.C. 1991). The ICC concluded that the spur was subject to state regulation and thus, exempt from its abandonment jurisdiction. *Id.* After reaching this conclusion, the ICC also revoked its Notice of Interim Trail Use ("NITU") because it only had authority to impose trail use where it can authorize abandonment. *Id.* After revoking the NITU, the ICC nevertheless stated, "that the underlying right-of-way can be preserved under 16 U.S.C. § 1247(d) without ICC authorization." *Id.* "The second sentence of section 1247(d) applies to 'any established railroad rights-of- way' and the statute itself provides that their interim trail use 'shall not be treated . . . as an

[13] Courts normally defer to the agency's interpretation of its own regulations. *See, e.g., Edelman v. Lynchburg College,* 122 S.Ct. 1145 (2002) (*citing Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44 (1984)); *Pennsylvania Liquor Control Bd. v. Richard E. Craft American Legion Home Corp.,* 718 A.2d 276, 279 (Pa. 1998) (Newman, J. dissenting).

abandonment of the use of such rights of way for railroad purposes.'" *Id.* Thus, in its administrative decision in *Southern Pacific,* the ICC indicated that the statute in and of itself supported a finding that railroad rights-of-way could be preserved in the absence of ICC authorization.

As to Appellants' argument regarding the ICC regulations, we acknowledge that the language of the regulations appears to support Appellants' argument. Yet, upon closer examination, it becomes clear that Buffalo Township did not need to comply with the regulations in order for the trail conversion to be valid.

The ICC has repeatedly stated that its function with regard to regulating trail use is ministerial. "The Commission is not involved in the negotiations between a railroad and trail use proponent. Nor does it analyze, approve, or set the terms of a trail use agreement." Study of Interstate Commerce Commission Regulatory Responsibilities, 1994 MCC Lexis 104 (October 12, 1994).

Federal case law has embraced the ICC's assertion that its function with regard to trail conversions is perfunctory. For example, in *Goos v. ICC,* 911 F.2d 1283 (8th Cir. 1990), the court entertained the question of whether the ICC needed to comply with the National Environmental Policy Act ("NEPA") when it granted a NITU pursuant to § 1247(d). Appellants argued that the ICC had to perform an environmental assessment pursuant to the NEPA before granting the NITU. In order to answer this question, the Court of Appeals for the Eighth Circuit needed to consider whether the issuance of a NITU or Certificate of Interim Trail Use ("CITU") constituted a "major federal action" obliging the ICC to fulfill the requirements of the NEPA.

In concluding that the ICC did not need to satisfy those requirements, the court accepted the ICC's argument that its issuance of a NITU or CITU is incidental to the abandonment process and merely provides an opportunity for the parties to negotiate a trail use agreement. *Goos,* 911 F.2d at 1293. Moreover, the ICC "*must* issue an NITU or CITU when a private party files a statement of willingness to assume financial responsibility and the railroad agrees to negotiate." *Id.* at 1295 (emphasis in original). The court stated:

> The I.C.C. interprets the section to give it no power to compel a conversion between unwilling parties, and, conversely, no discretion to refuse one if voluntarily negotiated. Once the parties reach agreement, the I.C.C. suggests that it cannot refuse to permit trail use.

Id. Thus, the court agreed that the ICC had "little, if any discretion to forestall a voluntary [trail use] agreement" and held that the ICC's action in these matters was ministerial and therefore, was outside the ambit of the NEPA requirements. *Id.* at 1295-96.

Other courts, following the lead taken by the court in *Goos,* have reached a similar result. *See, e.g., Citizens Against Rails-to-Trails v. Surface Transportation Board,* 267 F.3d 1144, 1153 (U.S. App. D.C. 2001) (rejecting Petitioners' argument that the Board [ICC] has discretion with regard to the issuance of a CITU); *see also Jost v. Surface Transportation Board,* 194 F.3d 79, 89 (U.S. App. D.C. 1999) ("The Act is clear that the Board 'shall' impose a trail condition . . . whenever a railroad is prepared to convey the right of way to an organization that is 'prepared to assume full responsibility' for management of the line.").

Based upon the above, we can surmise that the ICC's involvement in trail conversions is merely procedural. The regulations provide the procedure for the proposed interim trail user to follow for obtaining the NITU or CITU, which in turn, gives the parties the opportunity to negotiate an interim trail agreement. *See, e.g. Goos,* 911 A.2d at 1293. However, the regulations have no effect on the substance of the trail use agreement, rather the substance of the agreement is governed by the requirements of 16 U.S.C. § 1247(d). In other words, the ICC's action with regard to trail conversions amounts to no more than a "rubber stamp" authorizing trail conversions so long as the proposed trail user complies with the requirements of 16 U.S.C. § 1247(d). Section 1247(d) does not require that the proposed trail user file an application with the ICC. Rather, under section 1247(d), the right-of-way can be preserved so long as the interim use is subject to restoration or reconstruction by the railroad company and the trail user is willing to assume full managerial, financial and legal responsibility for the management of such rights-of-way and for any liability arising out of such transfer or use. Therefore, a railroad right-of-way can be converted to a recreational trail where there is a failure to file an application with the ICC, so long as the proposed trail user complies with the requirements of section 1247(d).

In this case, Buffalo Township agreed to take all financial, legal, and managerial responsibility for the trail and Conrail reserved a right to reactivate railroad service if the need ever arose. Thus, the transfer complied with the requirements of section 1247(d). Additionally, the Butler Branch is an established railroad right-of-way. *Southern Pacific, supra.* As such, the right-of-way can be

preserved under the National Act. We refuse to nullify the trail conversion in this instance due to the Township's failure to file an application with the ICC, especially where the ICC's actions in this area amount to no more than a rubber stamp of the application filed by Buffalo Township. We appreciate that if Buffalo Township had not made the inexplicable decision to withdraw its application with the ICC, then the legal action in this case would have been unnecessary. Nevertheless, this lapse does not affect our legal determination that the transfer of the right-of-way to Buffalo Township was effective even in the absence of filing an application for interim trail use with the ICC. Our decision today furthers the legislative purpose to promote interim trail use in order to preserve the railroad company's interest in the property, since Buffalo Township will preserve the right-of-way for the railroad company's future use. Thus, contrary to Appellants' argument, the land did not revert to them and the trial court properly enjoined Appellants from interfering with Buffalo Township's property interest.

Our analysis does not end here, since Appellants challenge the trial court's determination on two other bases. First, Appellants argue that the trial court erred in finding that Buffalo Township established a need for immediate relief and irreparable harm. However, this argument is without merit. As noted at the outset, *see supra* at 3, the trial court granted a *permanent* injunction in this matter, and as such, consideration of irreparable harm and need for immediate relief are not elements that are required for the issuance of a permanent injunction. *Soja, supra.*

Second, Appellants argue that the trial court should have submitted the issue of abandonment for jury consideration. Appellants point to numerous cases, which suggest that abandonment is an issue for the jury to decide. Appellants overlook that a motion for a preliminary or permanent injunction is a matter in equity, and thus, the court "on its own motion or upon the petition of any party may submit to trial by jury." Pa.R.C.P. 1513. A jury's verdict in equity cases is merely advisory, since they "shall not be binding upon the court." Ultimately, it would have been within the trial court's discretion to submit the issue to the jury and to decide whether to accept the jury's determination regarding abandonment.[14]

Based upon the analysis herein, we affirm the decision of the Commonwealth Court.

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[14] We disagree with the dissenting opinion's suggestion that it was improper for Appellee to invoke the trial court's equitable jurisdiction. In *Williams v. Bridy,* 136 A.2d 832 (Pa. 1957), we explained that "[i]t is the duty of the court when an injunction bill has been filed to inquire and ascertain whether the individual or corporation seeking the relief has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which it sought to be enjoined." *Id.* at 836. If a clear legal right to the property exists then an action in equity is proper. *Id.* As the dissent acknowledges, the trial court concluded that the facts were clear and there was no room for doubt and thus, Appellee properly invoked the equitable jurisdiction of the trial court. Dissenting slip opinion at 2. Our appellate review confirms the trial court's decision and we likewise conclude that Appellee had a clear legal right to the possessory property interest in this case.

The dissent also injects an issue regarding actual possession into this case by citing to the recent Supreme Court of Pennsylvania case *Siskos v. Britz,* 790 A.2d 1000 (Pa. 2002). *Siskos* is inapt to any analysis in this case. The question in that case was whether the court must rule upon possession before determining whether an Action in Ejectment lies in a particular case. We are not entertaining a similar issue in this case.

Mr. Justice Saylor files a dissenting opinion in which Mr. Justice Nigro joins.

Judgment Entered December 31, 2002,

/s/ John A. [Illegible]
DEPUTY PROTHONOTARY

[J-24-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BUFFALO TOWNSHIP, Appellee v. CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL AND MARGIE PURCELL, Appellants	No. 86 WAP 2001 Appeal from the Order of the Commonwealth Court entered June 14, 2001, at No. 1875CD2000, affirming the Order of the Court of Common Pleas of Butler County, Civil Division, entered on July 31, 2000, at No. 00-50009. ARGUED: March 6, 2002

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: DECEMBER 31, 2002

In rejecting Appellants' contention that their right to a jury trial was implicated, the majority indicates that Appellants overlook that a request for preliminary or permanent injunction is addressed to a court's equitable jurisdiction, and there simply is no right to a jury trial in

an equity action. *See* Majority Opinion, *slip op.* at 16-17. Appellants, however, do address this point, in effect, with the contention that it was improper for the common pleas court to invoke its equitable jurisdiction to resolve what is effectively a land title controversy.

I find merit in this argument. *See Williams v. Bridy,* 391 Pa. 1, 7, 136 A.2d 832, 836 (1957); *see also Teacher v. Kijurina,* 365 Pa. 480, 484-85, 76 A.2d 197, 200 (1950) ("title to real estate is ordinarily not properly raised by an action in equity unless it be by bill in partition, for the sound reason that in ejectment proceedings (the classic method of determining title to real estate), the parties are entitled to have disputed facts settled by a jury"); *accord Dairy Queen, Inc. v. Wood,* 369 U.S. 470, 471-73, 82 S. Ct. 894, 896-97 (1962). Indeed, in the present case, the common pleas court recognized the salient restrictions on its equitable jurisdiction, but merely circumvented them by indicating that the facts were clear and there was no room for doubt. *See Buffalo Twp. v. Jones,* EQ. No. 00-50009, *slip op.* at 6 (C.P. Butler Jul. 31, 2000). However, the question whether title reverted to Appellants by virtue of an abandonment of Conrail's right-of-way appears to have been keenly disputed, is treated as a fact-laden issue by the majority, and is itself within the range of issues in a land title controversy that must be determined by a jury. *See generally Quarry Office Park Assoc. v. Philadelphia Elec. Co.,* 394 Pa. Super. 426, 436, 576 A.2d 358, 363 (1990).

In my view, the common pleas court's order could potentially be validly sustained (putting aside other questions of appropriate procedure) if the record established that Appellee maintained actual possession of the disputed tracts as of the time of the filing of its complaint.

Cf. Siskos v. Britz, 567 Pa. 689, 701-02, 790 A.2d 1000, 1008 (2002) (establishing actual possession as the litmus in determining whether a right to a jury trial pertains in a land controversy). However, the common pleas court made no specific finding in this respect, and, although the record is somewhat vague on the point, there appears to be evidence that one or more of Appellants may have held actual possession for a substantial time period, including in the relevant time frame. *See, e.g.,* N.T., May 24, 2000, at 21, 26, 64, 68; N.T., July 5, 2000, at 131, 154, 171-72; N.T., Jul. 24, 2000, at 11, 15, 24, 29. Accordingly, I am unable to join the majority in approving the grant of a permanent injunction on the record presented.

Mr. Justice Nigro joins this dissenting opinion.

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Buffalo Township,	:	No. 1875 C.D. 2000
	:	ARGUED:
v.	:	May 7, 2001
Carl E. Jones, Kathryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell And Margie Purcell,	:	
Appellants	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge, HONORABLE DAN PELLEGRINI, Judge (P.), HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION BY JUDGE PELLEGRINI

(Filed: June 14, 2001)

Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell (collectively, Property Owners) appeal from an order of the Court of Common Pleas of Butler County (trial court) granting a permanent injunction enjoining them from blocking or obstructing a recreational trail or threatening, intimidating or coercing agents and employees of Buffalo Township or users of the trail.

This controversy involves a dispute over whether a 20.7-mile long right-of-way formerly known as the Butler Branch of a railway owned and operated by Consolidated Rail Corporation (Conrail) has been abandoned and, if not abandoned, whether it can be used by Buffalo Township as

a recreational trail. In the late 1860s, Conrail (formerly known as the Western Pennsylvania Railroad Company) constructed the Butler Branch that ran between Freeport, Armstrong County and Butler, Butler County. In the process of constructing the railway, Conrail secured rights-of-way and easements over privately-owned property through condemnation proceedings and right-of-way agreements.[1]

Pursuant to Section 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748, Conrail notified the Interstate Commerce Commission (ICC)[2] of its intent to file an application for abandonment of the Butler Branch railroad line due to insufficient revenue on October 31, 1985. Subsequently, Conrail filed a request for approval of abandonment of the railroad line with the ICC on June 5, 1987. On September 14, 1987, the ICC issued a Certificate of Decision and Order authorizing Conrail to abandon the 20.7-mile of the railroad line known as the Butler Branch.

In the early spring of 1990, B. Sykes Ltd., a salvage company, purchased the rails and ties from Conrail on the right-of-way and removed the rails and ties along the railroad line. On June 11, 1991, Conrail conveyed by quitclaim deed all of its rights, title and interest in the

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[1] The Butler Branch railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit and Winfield. However, only Buffalo Township is a party to this action.

[2] On January 1, 1996, the ICC ceased to exist and its duties were transferred to the Surface Transportation Board ("STB") in the Department of Transportation. ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995).

property to B. Sykes Ltd. who, in June 1991, in turn, conveyed by quitclaim deed all of its rights, title and interest in the property to Buffalo Township on June 14, 1991.

In 1992, Buffalo Township began to develop the railway property as a recreational trail pursuant to the Pennsylvania Rails to Trails Act, Act of December 18, 1990, P.L. 748, 32 P.S. §§5611-5622 (Pennsylvania Trails Act), and the National Trails System Act, 16 U.S.C. §§1241-1251 (National Trails Act). Seeking to enjoin adjacent property owners from interfering with the public's use of the trail, Buffalo Township filed a complaint in equity and simultaneously filed a motion for preliminary injunction which the trial court granted. Ultimately, the trial court granted a permanent injunction based on its finding that Conrail did not abandon the right-of-way, and Buffalo Township had the authority under the National Trails Act to construct the recreational trail and enjoined Property Owners from blocking or obstructing the trail in any way, threatening, intimidating or coercing agents and employees of Buffalo Township or any individuals using the trail. This appeal followed.[3]

I.

Normally, a railroad right-of-way terminates and the property interest reverts back to the property owner when

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[3] Our scope of review in cases involving a permanent injunction is limited to whether the trial court abused its discretion or committed an error of law. *Licensed Beverage Association of Philadelphia v. Board of Education of the School District of Philadelphia,* 669 A.2d 447 (Pa.Cmwlth.1995).

the land ceases to be used for railroad purposes. *See Brookbank v. Benedum-Trees Oil Company,* 389 Pa. 151, 131 A.2d 103 (1957); *Quarry Office Park Associates v. Philadelphia Electric Company,* 576 A.2d 358 (Pa. Superior 1990); *Lacy v. East Broad Top Railroad & Coal Co.,* 77 A.2d 706 (Pa. Superior 1951). Property Owners contend that because the right-of-way has ceased being used for railroad purposes, interest in the property reverts to them under Pennsylvania law.

While that is normally true, in order to establish a nationwide system of nature trails, Congress enacted the National Trail Systems Act, 16 U.S.C. §§1241-1251, *as amended,* in 1968.[4] Under this Act, Congress reserved to itself the right to designate scenic and historical trails, and delegated to the Secretaries of the Interior and Agriculture the authority to designate recreational trails and to develop and administer the trails system. *See* 16 U.S.C. §§1243, 1244 and 1246. The Act further provided that state or local governments or federal authorities could acquire the land necessary for a designated trail through cooperative agreements with landowners or by purchase; however, if all voluntary means for acquiring the right-of-way failed, the appropriate Secretary was given limited power to utilize condemnation proceedings in order to acquire private lands. 16 U.S.C. §1246.

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[4] The Pennsylvania Rails to Trails Act operates as an enabling act authorizing the Pennsylvania Department of Environmental Resources to participate in abandonment proceedings before the ICC for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking and authorizing the department, counties or municipalities to accept title, by gift or purchase, to available railroad rights-of-way for interim trail use.

Concerned about the substantial decrease in railway tracks throughout the country and in an effort to preserve railroad rights-of-way by converting unused rights-of-way to recreational trails, Congress enacted substantial amendments to the National Trail Systems Act in 1983. *See* 16 U.S.C. §§1241-1251. Those amendments authorized the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails. 16 U.S.C. §1241. Section 8(d) of the National Trail Act provides that a railroad wishing to cease operations along a particular route may negotiate with a state, municipality or private group that is prepared to assume financial and managerial responsibility for the right-of-way. 16 U.S.C. §1247(d).

The constitutionality of the National Trails Act was addressed by the United States Supreme Court in *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990). Concluding that the Act was reasonably adapted to two legitimate congressional purposes under the Commerce Clause – preserving rail corridors for future railroad use and permitting public recreational use of trails, the Court upheld the constitutionality of the National Trails Act as a valid exercise of congressional power under the Commerce Clause. In doing so, it held that railroad rights-of-way could be converted into recreational trails notwithstanding whatever reversionary property interests existed under state law.

The Court also addressed whether the National Trails Act violated the Fifth Amendment by precluding reversion of state property interests resulting in a taking of the underlying property owners' future interest in the railroad right-of-way. Although not determining whether a taking had occurred in the case before it, the Court held that a

violation of the Fifth Amendment only occurred where there was a taking of private property for public use without just compensation. The Court further determined that the Fifth Amendment merely required that compensation be made, not that compensation be paid prior to or contemporaneously with the taking. At the time of the actual taking, the only requirement was the presence of a "reasonable, certain and adequate provision for obtaining compensation" and that the property owner had no claim that an unconstitutional taking has occurred unless he or she had first utilized the available provision and received no compensation.

Because even if a taking had occurred, the property owners in *Preseault* had a sufficient remedy under the Tucker Act, 28 U.S.C. §1491(a)(1), or the Little Tucker Act, 28 U.S.C. §1346(a)(2) (creating concurrent jurisdiction in the district courts for such claims not exceeding $10,000 in amount), the Court held that the Fifth Amendment was not violated. Accordingly, where a railroad right-of-way was transformed into a recreational trail further burdening the property owner's fees simple interest, the property owner was forced to seek added compensation either under the Tucker Act or for a *de facto* taking under Section 502 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended,* 26 P.S. §1-502. In this appeal, Property Owners do not make any challenge that there was any uncompensated taking but simply that the National Trails Act does not apply.

II.

The first reason that Property Owners contend that the National Trails Act does not apply to this case is

because that Act requires that a state, political subdivision or private interest reserve a railroad right-of-way for interim use while an abandonment proceeding is ongoing where, in this case, the railroad right-of-way was abandoned in 1987 by order of the ICC. It argues that once abandonment proceedings were completed, the railroad right-of-way had been dissolved and could not be rail banked for future railroad purposes or utilized for an interim use under the Act, and, therefore, Buffalo Township had no right to develop the right-of-way as a recreational trail. While they acknowledge that for there to be an abandonment of a railroad right-of-way, there must be an actual abandonment demonstrated by intent to abandon accompanied by external acts effecting that intention, *id.*; *Burnier v. Department of Environmental Resources,* 611 A.2d 1366 (Pa. Cmwlth. 1992), Property Owners argue that the facts of this case establish both an intent on the part of Conrail to abandon the Butler Branch and external acts effectuating that intention, which include the following:

- On October 31, 1985, Conrail filed a Notice of Insufficient Revenues with the ICC.
- On June 8, 1987, Conrail requested approval from the ICC to abandon the Butler Branch pursuant to 45 U.S.C. §748.
- On September 14, 1987, the ICC issued a Certificate and Decision approving Conrail's request to abandon the Butler Branch.
- Conrail terminated railroad service prior to December 31, 1987.
- Conrail sold rails and ties to B. Sykes, Ltd., a salvage company, in the spring of 1990.

- B. Sykes, Ltd. removed the rails and ties from the Butler Branch.
- On June 7, 1990, Buffalo Township requested an Interim Trail Use from the ICC but later withdrew the request.
- The ICC acknowledged Buffalo Township's decision to withdraw its request and discontinued the proceeding.
- On June 11, 1991, Conrail, by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to B. Sykes, Ltd.
- On June 14, 1991, B. Sykes, Ltd., by quitclaim deed, conveyed all of its right, title and interest in the Butler Branch to Buffalo Township.

Buffalo Township, however, argues that it is clear that Conrail did not abandon its right-of-way because in conveying its interest in the right-of-way to B. Sykes Ltd., it reserved the right to re-enter the right-of-way to resume railroad activities as evidenced by the language of the quitclaim deeds from Conrail to B. Sykes Ltd. and subsequently from B. Sykes Ltd. to Buffalo Township. Specifically, Buffalo Township relies on the following language of the deed from Conrail to B. Sykes Ltd.:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining

> property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.
>
> * * *
>
> Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Likewise, Buffalo Township argues that Conrail's reservation of the right to re-enter the property was acknowledged and preserved in the quitclaim deed between B. Sykes Ltd. and itself which stated, in part:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation, permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining

property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.[5]

Property Owners at oral argument contended that the language of the deed only involved Conrail's access while the removal of the track was underway and in no way indicated that Conrail did not intend to permanently abandon the right-of-way. While that language is a reasonable interpretation of those provisions, Buffalo Township's interpretation of the language that Conrail reserved a right to re-enter the property in order to resume its previous railroad activities or to reconstruct its rail line is equally reasonable. Where, as here, the language in a contract is ambiguous and subject to different reasonable interpretations, what the agreement means is determined by the surrounding facts and circumstances and is a decision for the trier of fact. *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385 (1986).[6] Because, as the

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[5] Buffalo Township also argues that Conrail could not have abandoned the right-of-way because Pennsylvania law requires that a railroad seek approval from the Pennsylvania Public Utility Commission (PUC) before it can abandon a right-of-way. Specifically, it argues that because Section 2709 of the Public Utility Code, 66 Pa.C.S. §2709, requires that before disposing of real property previously used as a railroad bed a public utility engaged in a railroad business must notify the township in which the real property is located and any disposition of property without complying with the section is voidable, Conrail could not have abandoned its property without following those notification requirements. However, Section 2709 of the Public Utilities Code does not conclusively bar a railroad from abandoning its right-of-way but it merely provides that a transfer of property is voidable. Therefore, it does not invalidate the transaction automatically.

[6] An ambiguity exists if the language is subject to two or more reasonable interpretations. *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa.Cmwlth.1994), *petition for allowance of appeal denied*, 541 Pa. 628, 661 A.2d 875 (1995).

trier of fact, the trial court found that the language of the deeds reserved the right to re-enter the property to Conrail, absent an abuse of discretion, we must defer to that determination. *See In re Hall,* 731 A.2d 617 (Pa. Superior 1999).

In this case, while Conrail petitioned for and received approval from the ICC to abandon its rail line and subsequently, by quitclaim deed, conveyed its interest in the property to a salvage company, that alone is not sufficient to establish abandonment. Because a conclusion that abandonment has occurred is so severe because it forever extinguishes the right-of-way, even a certificate approving abandonment or that the rail line has not been used or has been transferred to a non-railroad entity is not sufficient. *See e.g. Birdsboro Municipal Authority v. Reading Company and Wilmington & Northern Railroad,* 758 A.2d 222 (Pa. Superior 2000); *Burnier; Quarry Office Park Associates; Lawson v. Simonsen,* 490 Pa. 509, 417 A.2d 155 (1980); *Lacy.* Here, the trial court found that Conrail, in conveying its interest in the right-of-way to B. Sykes Ltd., and consequently to Buffalo Township, reserved a right to re-enter the property and to establish or maintain a rail line for potential future railroad activities upon the right-of-way and that Conrail did not intend to abandon the right-of-way. *See e.g. Birdsboro.* Because the trial court did not abuse its discretion in finding that Conrail did not abandon the right-of-way, Property Owners failed to

establish that Conrail abandoned the right-of-way prior to Buffalo Township's acquisition. [7]

III.

Even if the railroad right-of-way was not abandoned, Property Owners contend that Buffalo Township had no authority to develop and operate a recreational trail under the National Trails Act because that Act requires that a trail sponsor seeking to transform a former railroad right-of-way into a recreational trail receive approval in the form of an Interim Trail Use from the ICC, which Buffalo Township failed to obtain. Specifically, they argue that Buffalo Township failed to comply with the requirements of 49 C.F.R. §1152.29, which provides that a political subdivision must file a petition indicating that it would

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[7] Even if Conrail terminated its railroad service, Buffalo Township contends the right-of way would not have been abandoned because Conrail, through its predecessor, the Western Pennsylvania Railroad Company, acquired the right-of-way property pursuant to the General Railroad Act of 1849, Act of February 19, 1849, P.L. 79, which provides, in part, "[t]hat upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight." Section 18 of the General Railroad Act of 1849. Under Section 18 of that Act, the right-of-way does not revert to Property Owners if the General Assembly desires to use it for a highway. What this provision seems to be saying is that the land was not only taken for a railroad right-of-way but also for a public highway. Section 20, though, requires that compensation be paid if the property is going to be used for such a purpose. Even though that is evidence that the right-of way would not have been abandoned, the Commonwealth has not adopted the right-of-way for highway purposes, so Buffalo Township cannot use that as an argument that it has a right to use the right-of-way as a trail which it contends is nothing more than a pedestrian highway.

like to use a rail line as a recreational trail. That section provides in part:

> Prospective use of rights-of-way for interim trail use and rail banking.
>
> (a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so.

While Buffalo Township concedes that it did not follow the procedure set forth in the ICC regulations promulgated under the National Trails Act at 49 C.F.R. §1152.29, it argues that the National Trails Act does not require a municipality to obtain ICC approval in order to develop and operate a recreational trail pursuant to the Act. In support of its contention, Buffalo Township relies on an ICC decision denying an interim trail use application because it lacked jurisdiction over the abandonment of a railroad spur track wherein the ICC stated:

> We are revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C. 10903 or 10505. Because the track at issue here is a spur, we do not have such jurisdiction over it. *We note, however, that the underlying right-of-way can be preserved under 16 U.S.C. 1247(d) without ICC authorization. The second sentence of section 1247(d) applies to "any established railroad rights-of-way" and the statute itself provides that their interim trail use "shall*

not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes."

Southern Pacific Transportation Company – Exemption – Abandonment of Service in San Mateo County, California, (Docket No. AB-12, slip op. filed February 20, 1991) (emphasis added).

To determine whether Congress intended to require states, political subdivisions or private entities to obtain ICC approval before developing and operating a recreational trail on a railroad right-of-way as an interim use, we look to the language of the National Trails Act. Section 8(d) of the Act, 16 U.S.C. §1247(d), provides:

Interim use of railroad rights-of-way.

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. §801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad

> purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Nowhere in Section 1247(d) does the Act require a municipality, which has accepted full responsibility for management of the right-of-way, including legal and financial liability arising out of its use as a recreational trail, to obtain approval from the ICC in order to take advantage of the protections of the Act. Moreover, the clear intent of Congress in enacting the National Trails Act – to encourage states, public subdivisions and private interests to establish trails in an effort to preserve for possible future railroad use of rights-of-way not currently in use, 16 U.S.C. §1247(a), – clearly supports the ICC's interpretation. Because the ICC in *Southern Pacific Transportation Company* concluded that a railroad right-of-way can be preserved for interim use as a recreational trail pursuant to the National Trails Act without ICC authorization, and that interpretation does not conflict with the clear language and intent of the Act and is reasonable, we will defer to their interpretation.[8]

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[8] In reviewing an agency's interpretation of a statute and its own regulations, unless the language is clear, we are required to defer to the

(Continued on following page)

Because Buffalo Township was not required to obtain ICC approval to develop and operate a recreational trail and has fulfilled all of the requirements set forth in Section 8(d) of the National Trails Act, including assuming full responsibility for management of the right-of-way and for any legal or financial liability arising out of the operation of the recreational trail, it was entitled to develop the right-of-way for interim trail use purposes pursuant to the National Trails Act.[9]

Accordingly, because Conrail did not abandon its railroad right-of-way and Buffalo Township was entitled to develop and operate a recreational trail pursuant to the National Trails Act, injunctive relief enjoining Property Owners from interfering with the public's use of the trail was appropriate and the decision of the trial court is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

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agency's interpretation of the statute and its own regulations. *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984); *Tool Sales & Service Co. v. Commonwealth,* 536 Pa. 10, 637 A.2d 607 (1993); *Bowles v. Seminole Rock Co.,* 325 U.S. 410 (1945); *Pelton v. Com., Dept. of Public Welfare,* 514 Pa. 323, 523 A.2d 1104 (1987).

[9] Property Owners also contend that the trial court erred in failing to submit the abandonment issue to a jury. However, because this action was brought in equity, even if the issue had been submitted to a jury, that determination would have been merely advisory and the final decision on the issue would have been made by the trial court. *See* Pa. R.C.P. 1513. Additionally, Property Owners contend that the trial court erred in finding that an immediate need for relief and irreparable harm existed. However, because those are factors to be considered in a preliminary injunction proceeding rather than a permanent injunction proceeding, we need not address those issues.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Buffalo Township	:	
	:	
v.	:	
	:	
Carl E. Jones, Katheryn L. Jones, Larry W. Tredway, Kassie Tredway, David C. Jones, Sylvia J. Jones, Jerry Purcell and Margie Purcell,	:	No. 1875 C.D. 2000
	:	
Appellants	:	

ORDER

AND NOW, this 14th day of June, 2001, the order of the Court of Common Pleas of Butler County, No. 00-50009, dated July 31, 2000, is affirmed.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

[STAMP] Certified from the Record
JUN 14 2001 and Order Exit

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL DIVISION**
CARL E. JONES, KATHERYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL and MARGIE PURCELL,	:	**EQ. No. 00-50009**
Defendants.	:	

For Plaintiff: **Lawrence P. Lutz, Esq.**
For Defendants: **William Claney Smith, Esq.**

Judge: **Martin J. O'Brien, P.J.** **July 31, 2000**

MEMORANDUM OPINION AND ORDER OF COURT

On May 5, 2000, Plaintiff Buffalo Township filed a Motion for a Preliminary Injunction and the Court granted said Motion. Defendants Carl E. Jones, *et al.* were enjoined, *inter alia*, "from blocking obstructing threatening intimidating, or coercing agents and employees of the Township of Buffalo or individuals using the Butler-Freeport Community Trial. . . . " Defendants Carl and Kathryn Jones, Larry and Kassie Tredway, David and Sylvia Jones (Carl Jones' son and daughter-in-law), and Jerry and Margie Purcell (Carl Jones' son-in-law and daughter) have subsequently filed a Motion to Dissolve the Preliminary Injunction.

Pursuant to Pennsylvania Rule of Civil Procedure 1531 the Court conducted lengthy hearings to determine whether the injunction should be dissolved, modified, or made final.

This controversy is part of a dispute over rights-of-way, easements, *et cetera,* of an approximately twenty-one (21) mile parcel of land formerly known as the Butler Branch of a railway operated by Consolidated Rail Corporation ("Conrail") (formerly Western Pennsylvania Railroad Company). Conrail obtained its interest in these properties by a variety of means including grants of rights-of way and easements, and condemnations. The railway line ran from the City of Butler through the Townships of Butler, Buffalo, Jefferson, Summit, and Winfield.

In October 1968, the National Trails System Act was passed for the purpose of establishing trails to serve the outdoor recreational needs of the public. ***See*** 16 U.S.C.A. §§ 1241-1251. The Act encouraged States and local agencies and private interest groups to assist in the development of a National Trails System and contemplated the use of former railways as trails. ***See id.***

The Pennsylvania Legislature subsequently enacted the Rails to Trails Act in December 1990 for the purpose of acquiring available railroad rights-of-way and developing them into public recreational trails. ***See*** 32 P.S. §§ 5611-5622.

On June 11, 1991, Conrail conveyed by quitclaim deed all of its "right, title and interest" in the railway property to B. Sykes Ltd. ***See*** Plaintiff's Exhibit No. 1. On June 14, 1991, B. Sykes Ltd. Conveyed by quitclaim deed all of its "right, title and interest" in the railway property to Buffalo Township. ***See*** Plaintiff's exhibit No. 2.

About 1992, Plaintiff Buffalo Township began to develop the railway property as a walking and biking trail in cooperation with the Pennsylvania Rails to Trails Act, 32 P.S. §§ 5611-5622, and the National Trails Systems Act, 16 U.S.C.A. §§ 1241-1251. ***See*** N.T., 5/24/00, at 17. Plaintiff Buffalo Township received federal, state, local and private monetary contributions for the development of the trail and invested approximately $364,000.00 in its development. ***See id.*** at 18-19.

Defendants Carl Jones, *et al.* do not dispute that Conrail had an interest in the property by grants of rights-of-way, easements, *et cetera*. Defendants Carl Jones, *et al.*, dispute, however, that Conrail transferred its right, title and interest in the railway property ultimately to Plaintiff Buffalo Township. Instead, Defendants Carl Jones, *et al.* claim Conrail abandoned the railway property thereby causing Conrail's interests in the land to revert back to Defendants Carl Jones, *et al.*

Presently, Plaintiff Buffalo Township alleges Defendants Carl Jones, et al., who own property adjacent to the trail, are blocking access to and use of the trail. Plaintiff Buffalo Township alleges Defendants Carl Jones, *et al.* are placing blockades, including wooden fencing, stone, barbed wire, dirt, and debris, at various entrances to the trail and along the trail. These blockades, Plaintiff Buffalo Township contends, inhibit individuals from using and enjoying the trail and prevent emergency access to the trail.

The Superior Court of Pennsylvania has held that in order to sustain an injunction, the plaintiff must establish (1) a clear right to relief, (2) an immediate need for relief, and (3) an irreparable injury if the injunction is not

granted. ***See Sovereign Bank v. Harper***, 674 A.2d 1085, 1091 (Pa.Super. 1996).

Clear Right to Relief

The plaintiff has the burden of establishing a clear right to relief by showing the plaintiff has title or other legal rights to the property. ***See Carringer v. Taylor***, 586 A.2d 928, 931 (Pa.Super. 1990).

The Supreme Court of Pennsylvania has stated "if the kernel of the controversy is the legal title to land, then equity cannot be invoked." ***See Williams v. Bridy***, 136 A.2d 832, 836 (Pa. 1957). Plaintiff's legal right to use, occupation, or enjoyment of the property must be clear. ***See id***.

The Superior Court of Pennsylvania has stated "where the plaintiff's right has not been established at law, or is not clear, [the plaintiff] is generally not entitled to remedy by injunction." ***See St. Mark's Evangelical Lutheran Church v. Briarcliff Realty Co.***, 177 A.2d 169, 171 (Pa.Super. 1962) (citing ***Hunter v. McKlveen, Prothonotary***, 353 Pa. 357, 45 A.2d 222 (1946)). If, however, "the plaintiff's title is clear, and all evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief although there has been no adjudication of the title at common law." ***See St. Mark's***, 177 A.2d at 171.

Under Pennsylvania Law a railroad's use of land it obtained by rights-of-way, easements, and so forth does not cease until the railroad officially abandons the land. ***See generally Daddona v. Thorpe***, 749 A.2d 475

(Pa.Super. 2000), ***Palm Corp. v. Commonwealth, Dep't of Transp.***, 688 A.2d 251 (Pa.Cmwlth. 1997), ***Thompson v. Maryland and Pennsylvania R.R. Preservation Soc'y***, 612 A.2d 450 (Pa.Super. 1992), ***Burnier v. Dep't of Envtl. Resources***, 611 A.2d 1366 (Pa.Cmwlth. 1992).

The Superior Court of Pennsylvania has stated that in order to establish abandonment it must be shown that the dominant tenement (the railroad) had an intention to abandon the easement, right-of-way, *et cetera* coupled with either (1) adverse possession by the owner of the servient tenement, (2) obstruction of the easement, right-of-way, *et cetera* by the dominant tenement that is inconsistent with its further enjoyment, or (3) affirmative acts by the owner of the dominant tenement that renders the use of the easement, right-of-way, *et cetera* impossible. ***See Daddona***, 749 A.2d at 488-89.

The Commonwealth Court of Pennsylvania has held that "[m]ere nonuse of a rail line does not constitute abandonment." ***See Burnier***, 611 A.2d at 1368. The Court also held that interim trail use also does not constitute abandonment of the railway. ***See id.*** The railroad company may convey its interest in the land to a "non-railroad" entity without abandoning the railway. ***See id.***

The National Trails Systems Act directs federal agencies to encourage state and local agencies to "preserve established railroad rights-of-ways for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use. . . . " ***See*** 16 U.S.C.A. § 1247(d). Under the National Trails Systems Act, interim use of the railway by means of donating, transferring, leasing, selling or otherwise does not constitute abandonment of the use of such land for railroad

purposes if such interim use is subject to restoration or reconstruction of the railway. ***See id.***

The Pennsylvania Rails to Trails Act was enacted to help facilitate the acquisition, operation, maintenance, and development of available railroad rights-of-way for public recreational trail use. ***See,*** 32 P.S. §§ 5611-5622. Under the Rails to Trails Act, counties and municipalities were able to acquire by gift or purchase use of the rights-of-way and accept title to the available railroad rights-of-way in conveyances by quitclaim deed or warranty deed. ***See*** 32 P.S. § 5614(c)(2).

In the present action, Plaintiff Buffalo Township admits that on September 14, 1987 Conrail received authorization from the Interstate Commerce Commission to abandon the line. This certificate of authorization, alone, does not amount to abandonment of the railway. ***See Thompson***, 612 A.2d at 454-56. At most it shows Conrail had an intention of abandoning the railway. ***See id.*** Pennsylvania Law, however, requires proof of an actual abandonment demonstrated by an intent to abandon accompanied by external acts effecting that intention. ***See id.*** at 453, ***Burnier***, 611 A.2d at 1368.

Normally, the determination of whether a railroad has actually abandoned its right of way by acting upon and effecting its expressed intention to abandon is a question for a jury to decide." ***See Thompson***, 612 A.2d at 453. However, the Court need not submit such a question to the jury where the facts are clear and there is no room for doubt. ***See id.***

In the present action Conrail, after obtaining authorization from the Interstate Commerce Commission to abandon the line, conveyed its right, interest, and title in

the property to B. Sykes Ltd. The deed contained the following language:

> EXCEPTING AND RESERVING, thereout and therefrom and unto the said Grantor [Conrail], permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on over under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Grantor's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.
>
> . . .
>
> Grantor [Conrail] and Grantee [B. Sykes Ltd.] contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

The deed whereby B. Sykes Ltd. conveyed the same right, title, and interest in the railway to Plaintiff Buffalo Township contained similar language contemplating Conrail's potential future use of the property for rail purposes. The language as follows:

EXCEPTING AND RESERVING, thereout and therefrom and unto the said Consolidated Rail Corporation permanent, perpetual, exclusive and assignable easements and rights for ingress and egress purposes in, on, over, under, above, across, through and along the southerly end of the premises hereinbefore described for access to and from a public street and to the northerly end of Consolidated Rail Corporation's remaining property at Mile Post 0.6 and as indicated on Case Plan No. 69593, sheet 1 of 22.

. . .

(7) Grantor and Grantee contemplate that Grantor shall (a) operate its trains, cars and engines to or on the land hereinbefore described (or any portion thereof), (b) establish or maintain a track connection with Grantee, or (c) provide cars or car service to Grantee. The Grantee agrees that such activities shall be conducted only on such terms and conditions as Grantor and Grantee hereto may hereafter mutually agree upon in writing and Grantor shall not be called upon to operate its cars, engines or equipment on any part of the land hereinbefore described or to accept any obligations unless they are in a written agreement between Grantor and Grantee hereto.

Pursuant to the National Trails System Act interim use of a railway in which the railroad contemplates restoration and reconstruction of the railway for railroad purposes does not constitute abandonment of the railway. ***See*** 16 U.S.C.A. § 1247(d). Furthermore, Pennsylvania Courts recognize that interim use of a railway as a trail does not mean the railway abandoned its interests in the

land such that ownership of the land reverts back to the original landowners. ***See Burnier***, 611 A.2d at 1367.

In the instant case, Conrail conveyed its interest in the land to B. Sykes Ltd. reserving for itself access the railway and future use of the railway upon agreement with B. Sykes Ltd. Shortly after this conveyance, B Sykes Ltd. conveyed its interest in the railway to Plaintiff Buffalo Township reserving again access for Conrail to the railway and use of the railway for railing purposes upon agreement with Plaintiff Buffalo Township. The railway land, albeit cleared of its railway tracks, still retains its geographical layout suitable for railway construction and no structures or impediments have been erected on the land by Plaintiff Buffalo Township or B. Sykes Ltd. that would inhibit the restoration or reconstruction of the railway at a future time. In essence, Plaintiff Buffalo Township is simply preserving the land in the event Conrail chooses to re-start operation of its rail services or a national need for rail services arises. The language in the deeds clearly indicates Conrail contemplated the future possibility of reconstruction and restoration of the railway. Both conveyances of the interest in the land conform with the National Trails System Act and the Pennsylvania Rails to Trails Act. ***See*** 16 U.S.C.A. §§ 1241-1251, 32 P.S. §§ 5611-5622.

Therefore, pursuant to the National Trails System Act because the interim use of the railway as a walking and biking trail is subject to Conrail and/or B. Sykes Ltd.'s restoration and reconstruction of the railway Conrail clearly did not abandon the railway. ***See*** 16 U.S.C.A. § 1247(d). ***See also Daddona***, 749 A.2d at 475, ***Palm Corp.***, 688 A.2d at 251, ***Thompson***, 612 A.2d at 450, ***Burnier***, 611 A.2d 1366.

Conrail did not abandon the railway, and therefore, cause a reversion of its interest in the land to the adjacent landowners. The Court finds Conrail conveyed its interests in this land to B. Sykes, Ltd. who in-turn conveyed the same interests to Plaintiff Buffalo Township.

Therefore, the Court finds Plaintiff Buffalo Township, as Grantee of Conrail's interest in the land, has a clear legal right to relief by means of an injunction conditioned upon the establishment of the remaining two elements of an injunction.

Immediate Need for Relief

The second element necessary for a final injunction to be issued is the showing that the need for relief is immediate. ***See Sovereign Bank***, 674 A.2d at 1091.

Albert Roenigk, Chairman of the Board of Supervisors of Buffalo Township, testified that the surface of the trail consisted of crushed limestone. ***See*** N.T., 5/24/00, at 24. He further stated this surface would permit vegetation to grow through it and around it. ***See id.*** at 25. If Plaintiff Buffalo Township did not have continual access to the trail for purposes of performing maintenance work on the trail the trail would become overgrown with vegetation. ***See id.*** at 25-29. Mr. Roenigk remarked that individuals walking on the trail, bicycling on the trail, or otherwise using the trail helped to maintain the trail and stop the growth of vegetation. ***See id.*** The various blockades erected at certain areas of the trail, Mr. Roenigk remarked, have limited Plaintiff Buffalo Township's access to the trail, as well as blocked access to potential users of the trail. ***See id.***

Mr. Roenigk also testified emergency service vehicles, including ambulance, fire, and police vehicles, had trouble easily accessing certain portions of the trail because of the blockades. ***See id.*** at 25-39.

Counsel for Plaintiff Buffalo Township entered into the record several photographs of portions of the trail that depicted the condition of the trail as a result of the blockades and growth of vegetation.

Plaintiff Buffalo Township alleges it invested approximately $364,000.00 in the construction of the trail. If Plaintiff Buffalo Township is not permitted to continuously maintain the trail and if individuals are not continuously permitted to use the trail thereby helping to diminish the growth of vegetation Plaintiff Buffalo Township's investment in the trail will be substantially diminished as the trail will quickly become over grown. Mr. Roenigk stated that without proper maintenance the land quickly looses its characteristics of a trail due to the overgrowth of vegetation. ***See id.*** at 28. The urgency and necessity of maintenance on the trail presents a harm that should be addressed by an injunction.

Furthermore, if proper access continues to be denied and vegetation is permitted to grow the land as it was conveyed to Plaintiff Buffalo Township would soon be no longer suitable land upon which Conrail may reconstruct and restore the railway if it so chooses. The interim use of the land, as indicated by the National Trails System Act, should be designed to maintain the land in a condition that would make reconstruction and restoration of the railway easy and cost efficient. To allow the trail to become overgrown and lose its identity and configuration of a trail would defeat the purpose of the National Trails

System Act. The Court cannot allow this to happen and may address the harm being caused to the trail.

Additionally, access by emergency vehicles is being hampered to areas of the trail. Although Counsel for Defendants Carl Jones, *et al.* argues there have been no or only a very limited number of emergency instances on the trail since its construction the lack of instances is not significant. Rather, the Court is concerned more with whether emergency service vehicles could attend to situations along the trail should the need ever arise. The Court finds given the overgrowth of the trail and the various blockades being erected along the trail emergency vehicles cannot sufficiently and properly service the trail in an efficient and effective manner. Therefore, it is proper to immediately redress this harm being caused to the public by insuring proper access to the trail by emergency service vehicles.

Irreparable Injury

The final element of an injunction is that the harm must be irreparable. ***See Sovereign Bank***, 674 A.2d at 1091. The Superior Court of Pennsylvania has defined "irreparable harm" as injury that cannot adequately be compensated by money damages. ***See id.*** "An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." ***See id.*** at 1093.

In the present case, the Court has heard lengthy testimony and argument concerning the use of this railway as a walking and biking trail by the public. The National Trails System Act contemplates the development of these types of land into recreational areas and historic

trails for use by the public. ***See*** 16 U.S.C.A. § 1247. The Pennsylvania Rails to Trails Act was enacted for the purpose of acquiring, operating maintaining, and developing available railroad rights-of-ways for public recreational trail use. ***See*** 32 P.S. § 5613.

In the present case, the public is being denied use and enjoyment of the trail because of the overgrowth of vegetation. Additionally, the public is being denied use and enjoyment of the trail because of the various blockades erected along the trail, including dirt, stone fencing, hay bails, and barbed wiring. These types of blockades also prevent the safe use of the trail as these types of devices are likely to cause serious injury to unwary and unsuspecting users of the trail. Should the individuals using the trail be injured by such devices it is questionable whether emergency service vehicles would be able to reach the persons for treatment thereby increasing the seriousness of there [sic] injury for lack of treatment.

A monetary value cannot be placed on the public's use and enjoyment of this trail for recreational purposes. The damage caused to the public by the denial of use and enjoyment of the trail because of overgrowth of vegetation, denial of access by blockades, and threat of sustaining injury is not measurable by an accurate pecuniary standard.

Therefore the Court finds the harm caused by the denial of public use and enjoyment of the trail is irreparable.

The Court finds Plaintiff Buffalo Township has established all of the necessary elements for the issuance of a final injunction.

IN THE COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

BUFFALO TOWNSHIP,	:	
Plaintiff,	:	
v.	:	
CARL E. JONES, KATHRYN L. JONES, LARRY W. TREDWAY, KASSIE TREDWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, and MARGIE PURCELL,	:	**CIVIL DIVISION**
	:	**EQ. No. 00-50009**
Defendants.	:	

Judge: Martin J. O'Brien, P.J.

ORDER OF COURT

AND NOW, this 31st day of July 2000, the Court hereby **ORDERS** that a final injunction be entered in this matter whereby:

1. Defendants Carl Jones, *et al.* and all other parties owning property along the trail are enjoined from blocking or obstructing the trail in any way, including erecting blockades of dirt, stone, barbed wire, fencing, or hay bails, and are enjoined from caused other persons to block or obstruct the trail.

2. Defendants Carl Jones, *et al.* are enjoined from threatening, intimidating, or coercing agents and employees of Plaintiff Buffalo Township or any such individuals using the trail and are enjoined from causing other

persons to threaten, intimidate, or coerce agents and employees of Plaintiff Buffalo Township or users of the trail.

3. Defendants Carl Jones, *et al.* are directed to remove all blockades, barriers, and obstructions of any type which they have placed on the trail or have caused to be placed on the trail by other persons.

4. Defendants Carl Jones, *et al.* are enjoined from denying access to the trail by any means.

The Court hereby **DIRECTS** the Sheriff of Butler County and the local and state police to take any appropriate action they deem necessary to enforce this Injunction and to maintain free and open access to the trail for users and for emergency service vehicles. Any violators of this Injunction are to be immediately taken into custody by the authorities and be brought before this Court forthwith. Any person found to have violated this Injunction and in contempt of Court shall pay a fine in the amount of $500.00 in additional to any other fines, costs, restitution, and terms of incarceration the Court shall in its discretion deem appropriate.

The Court hereby **DIRECTS** the Sheriff of Butler County to service upon all of the above named defendants a copy of this Order of Court.

BY THE COURT:

/s/ Martin J. O'Brien
MARTIN J. O'BRIEN, P.J.

CERTIFICATE OF SERVICE

I, William Claney Smith, do hereby certify that a true and correct copy of the Appellants' Application for Reargument, was served on the following attorneys of record by first class mail, postage pre-paid, on January 14, 2003.

Lawrence P. Lutz, Esq.
220 South Main Street, Suite 105
Butler, Pa. 16001

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February 19, 2003

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Supreme Court of Pennsylvania
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In re: BUFFALO TOWNSHIP v. CARL E. JONES, et al. No. 86 WAP 2001, Motion for Reargument.

WILLIAM A. LUCAS, et al. v. TOWNSHIP OF BETHEL, et al. U.S. Court of Appeals for the Third Circuit, No. 01-3946, February 11, 2003.

Rule 2501 (b), Rules of Appellate Procedure

BUFFALO TOWNSHIP v. JONES, et al. No. 86 WAP 2001, is presently before the Court on an Application for Reargument.

LUCAS v. THE TOWNSHIP OF BETHEL, ET AL. was decided by the United States Court of Appeals, Third Circuit, on February 11, 2003, and received by counsel on February 13, 2003.

In the Brief of Buffalo Township there is cited, *Southern Pacific Transportation Co., Exemption*, 1991 WL 108272 (ICC 1991) for the proposition that: "*the underlying right-of-way can be preserved under 16 U.S.C. 1247(d)*

without ICC authorization." Brief of Buffalo Township Pages 18 and 19. The same authority and quotation is cited in the Supreme Court Opinion on Page 13.

Commencing on page 13 through page 15 the Opinion by Mr. Justice Cappy, rationalizes this proposition, and concludes that:

"a railroad right-of-way can be converted to a recreational trail where there is a failure to file an application with the ICC, so long as the proposed trail user complies with the requirements of section 1247(d). (Opinion p. 15)

The U.S. Court of Appeals for the Third Circuit has held to the contrary on this issue in *WILLIAM A. LUCAS, et al. v. TOWNSHIP OF BETHEL, et al.*, U.S. Court of Appeals for the Third Circuit, No. 01-3946, February 11, 2003 (at P.3).

> "The ICC was never asked to intervene and prevent abandonment to certifying an interim trail use under the National Trail Act. Thus, the Act's provisions are inapplicable in this case."

A further reading of the briefs in both cases discloses that the argument of the Trail organization and the Township of Buffalo were identical on this issue.

Enclosed are nine copies of the Opinion in the Lucas case in the U.S. Court of Appeals, eight copies of this letter, and a Proof of Service.

It is believed that this Opinion fails within Rule 2501(b). It appears that the decision of the Court of Appeals is opposite the theory advanced as the basis for the Supreme Court's opinion by Mr. Justice Cappy.

/s/ William Claney Smith
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PRECEDENTIAL

Filed February 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 01-3946

WILLIAM A. LUCAS; AUGUST LUCAS; DAVID J. KUSHON; JANIE B. KUSHON,
Appellants

v.

TOWNSHIP OF BETHEL; JAMES RIEDERER; ROBERT E. PRUNTY; MARGARETTA REED; ALLEGHENY VALLEY LAND TRUST

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 98-cv-01928)
District Judge: Honorable Donetta W. Ambrose

Argued April 30, 2002

Before: ROTH, NYGAARD and WEIS, *Circuit Judges*

(Opinion filed: February 11, 2003)

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OPINION OF THE COURT

ROTH, Circuit Judge:

This jurisdictional dispute requires us to decide whether the District Court or the Surface Transportation Board (STB) has authority to resolve a property claim involving a defunct railroad line. The line, known as the Allegheny Secondary Track, was used by the Consolidated Rail Corporation (Conrail) as a railroad right of way. In 1989, the STB's predecessor, the Interstate Commerce Commission (ICC),[1] granted Conrail unconditional authorization to abandon the

[1] Effective January 1, 1996, the ICC was abolished and the STB was established to assume the responsibility of regulating rail transportation. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 804, 49 U.S.C. § 701, note. *See Friends of Atglen-Susquehanna Trail, Inc. v. STB*, 252 F.3d 246, 250 n.1 (3d Cir. 2001). With regard to events in this case that predate the STB, we will refer to the ICC as the agency in place at the time.

Allegheny Secondary Track. *See* Section 308 of the Regional Rail Reorganization Act, 45 U.S.C. § 748(c). Conrail subsequently sold its interest in the right of way to the Allegheny Valley Land Trust (AVLT), which intended to convert the line to a trail use.

Notwithstanding Conrail's sale to the AVLT, plaintiffs, who own real property underlying the Allegheny Secondary Track, claim that Conrail's interest reverted to them when Conrail abandoned its right of way. Thus, when the AVLT permitted the Township of Bethel to enter plaintiffs' property and remove materials from the Allegheny Secondary Track, plaintiffs brought this lawsuit, claiming that the Township trespassed on their property and violated their constitutional rights.

The District Court dismissed plaintiffs' claims on the ground that it lacked subject matter jurisdiction to determine whether Conrail had abandoned its line. Despite the ICC's unconditional authorization of abandonment, the District Court held that the STB retained exclusive jurisdiction over the issue of abandonment. The court reasoned that the STB would retain exclusive jurisdiction unless and until it determined that Conrail fully abandoned the rail line and that the abandonment occurred before the AVLT converted the line to a trail use. Otherwise, the current trail use of the Allegheny Secondary Track would provide continued basis for STB jurisdiction under the National Trails Act, 16 U.S.C. § 1247(d), and would prevent the right of way from reverting to plaintiffs.

We will reverse the District Court's dismissal of this action. We hold that the ICC's unconditional authorization of abandonment was sufficient to end its jurisdiction over the Allegheny Secondary Track. First, the abandonment

was authorized under § 308, a provision that substantially limits the STB's authority to place the usual conditions on abandonment of a railroad right of way. Second, both the Supreme Court and this Court have noted that the ICC's jurisdiction ends once it grants *unconditional* authorization to abandon a line, as is the case here. Finally, the ICC was never asked to intervene and prevent abandonment by certifying an interim trail use under the National Trail Act. Thus, the Act's provisions are inapplicable to this case. We address these points in more detail below.

I. Facts and Procedural History

Plaintiffs own two separate parcels of real estate. In 1852, a previous owner of the land subjected both parcels to a railroad right of way, known as the Allegheny Secondary Track. Since that time, a number of different railroad companies have operated trains over the Allegheny Secondary Track. Conrail acquired this right of way on April 1, 1976, and had common carrier obligations on the track from April 1, 1976, until June 8, 1989.

On June 8, 1989, the ICC authorized Conrail to discontinue service over the Allegheny Secondary Track pursuant to § 308(c) of the Regional Rail Reorganization Act. Plaintiffs claim that Conrail's interest in the right of way reverted to them when Conrail abandoned the line pursuant to the ICC's order. Thus, plaintiffs deny that the AVLT was authorized to allow the Town of Bethel to enter

plaintiffs' property in order to remove ballast[2] from the right of way.

A. Abandonment under § 308(c) of the Regional Rail Reorganization Act.

In the Northeast Rail Service Act of 1981 (NERSA), Congress amended the Regional Rail Reorganization Act of 1973 by adding § 308.[3] Under § 308(c), Conrail may abandon an unprofitable right of way by filing a notice of insufficient revenues, waiting at least 90 days, and then filing an application for abandonment. *See* 45 U.S.C. § 748(c). The express language of § 308(c) requires the ICC to grant Conrail's application 90 days after it is filed and allows the agency to delay abandonment only if an offer of financial assistance is made within 90 days of Conrail's application. 45 U.S.C. § 748(c)-(d); 49 U.S.C. § 10904(d)(2). The ICC has also noted that it may delay § 308 abandonments under the interim use provisions set forth in the National Trails Act, 16 U.S.C. § 1247(d). *See Rail Abandonments – Use of Right of Ways as Trails*, 2 I.C.C.2d 591, 613 (April 16, 1986).

Conrail initiated this abandonment procedure on October 31, 1985. It notified the ICC that it intended to abandon the Allegheny Secondary Track by filing a notice of Insufficient Revenues under § 308(c). Conrail filed an

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[2] Ballast is a coarse stone used to form the bed of a railroad track or road.

[3] The amendment adding § 308 was enacted as § 1156 of the NERSA, and as Subtitle E of the Omnibus Budget Reconciliation Act of 1981 (Public Law No. 97-35). It is codified at 45 U.S.C. § 748.

application for approval of abandonment well over 90 days later, on March 8, 1989. On June 8, 1989, and as required by § 308, the ICC authorized Conrail to abandon its line. The ICC's certificate of abandonment states that no offer of financial assistance was made within 90 days of Conrail's application, and, thus, there was no reason to delay approval under § 308(c). The June 8, 1989, certificate does not suggest that the ICC intended to place any National Trails Act conditions on Conrail's abandonment of its line. The ICC neither mentioned the provisions of 16 U.S.C. § 1247(d) nor certified an interim trail use.[4] The ICC's June 8 order has never been appealed and neither the ICC nor the STB has ever reopened abandonment proceedings.

B. Sale of Conrail's Right of Way.

After the ICC issued its order authorizing abandonment, Conrail pursued the sale of its interest in the Allegheny Secondary Track. One of the parties with which it negotiated was the AVLT, a non-profit organization that seeks to convert unused railroad beds into recreational trails while preserving the road beds for future rail uses. Before the AVLT purchased the Allegheny Secondary Track rail corridor from Conrail, it entered into a bridge maintenance agreement with the County of Armstrong and the county's Conservancy Charitable Trust. Both the

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[4] Nor did it address the requirements of the National Historic Preservation Act, 16 U.S.C. § 470f. *See Friends of the Atglen-Susquehanna Trail*, 252 F.3d at 251. We need not address the applicability of § 470f in this case, however, as there is nothing in the record to suggest that the line abandoned by Conrail would be "eligible" for inclusion in the National Register.

bridge agreement and a piece of related correspondence sent to Conrail made reference to the AVLT's intention to use the property as a rail trail.

Conrail sold the rail corridor to AVLT on January 7, 1992. At the time of sale, all the equipment for operating trains on the corridor remained intact. The sale agreement explicitly allowed Conrail the right to remove the railroad track and all its appurtenant materials, excluding ballast and bridges. Conrail's sale agreement also stated that it did not contemplate providing rail service on the property.

Several times after the sale, the AVLT declared its intention to preserve the Allegheny Secondary Track as an interim recreational use trail under the National Trails Act, 16 U.S.C. § 1247(d). Conrail, however, refused the AVLT's request to apply for an extension from the ICC to authorize "rail banking" of the corridor, as is required by ICC regulations if the roadbed is to be preserved for trail use. 49 C.F.R. § 1152.29(c)(1). Moreover, the AVLT never filed for an interim use with the ICC, another regulatory requirement for trail use. 49 C.F.R. § 1152.29(a). On April 6, 1992, Conrail requested approval from the Pennsylvania Public Utilities Commission (PUC) to remove rails and ties at certain crossings along the Allegheny Secondary Track. After October 15, 1992, when the PUC approved abolishment of all but one of these crossings, Conrail entered an agreement to sell various track materials, excluding ballast, to a salvage company.

C. First state court action.

In August of 1995, plaintiffs filed an action in the Court of Common Pleas of Armstrong County and named as defendants the AVLT, the Conservancy, the Armstrong

Rails to Trails Association, Conrail, and the officers of these organizations. The plaintiffs sought a declaratory judgment that Conrail had abandoned the Allegheny Secondary Track; an accounting; damages for disparagement and slander of property, trespass and continuing trespass; and injunctive relief barring any continuing trespass. Claims against Conrail were dismissed at the pleadings stage because plaintiffs alleged, and Conrail agreed, that it had abandoned its interest in the land at issue. The Pennsylvania Superior Court affirmed the dismissal of claims against Conrail.[5] Claims against the remaining parties were remanded to the trial court and proceeded to summary judgment. Because the summary judgment ruling both post-dates and relies upon the District Court's ruling in this case, we will discuss that ruling along with our discussion of the District Court proceedings, below.

D. Removal of ballast.

In approximately July of 1997, the AVLT offered the Township of Bethel the opportunity to remove and keep the ballast on the Allegheny Secondary Track. When the Township accepted, it was unaware of the pending lawsuit and it relied on AVLT's representation that it owned the right to the ballast. Plaintiffs and the Township dispute

[5] This Superior Court decision to excuse Conrail from a property dispute over a line that it no longer operates is distinct from the jurisdictional determination at issue here. Thus, we reject plaintiffs' argument that the Pennsylvania Superior Court's dismissal of Conrail has preclusive effect on the issue of STB jurisdiction over the Allegheny Secondary Track.

whether the Township removed survey stakes and additional soil material in addition to ballast. Plaintiffs also testified that they objected when they learned of the Township's action.

E. Current lawsuit.

Plaintiffs filed a lawsuit against the Town of Bethel and its agents on October 1, 1998. Their complaint includes a state law claim for trespass and continuing trespass, as well as federal § 1983 claims alleging violations of the Fourth Amendment, the Takings Clause of the Fifth Amendment, and substantive and procedural due process under the Fourteenth Amendment. Defendants filed a third-party complaint against AVLT on December 4, 2000.

AVLT and defendants joined in a motion to dismiss based on a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). They argued that the District Court lacked jurisdiction to address plaintiffs' trespass and constitutional claims because the STB has exclusive and plenary jurisdiction over the initial determination of whether Conrail has fully abandoned the Allegheny Secondary Track, a central threshold issue underlying plaintiffs' claims. The Magistrate Judge agreed and recommended that the action be dismissed. The District Court issued an order on October 1, 2001, adopting this recommendation and dismissing the action without prejudice. Plaintiffs filed a timely notice of appeal.

On April 8, 2002, the Armstrong County Court of Common Pleas followed the District Court's ruling and held that it lacked subject matter jurisdiction over plaintiffs' property claims against the AVLT et al. *See Moody v.*

AVLT et al., Opinion and Order re: Cross Motions for Summary Judgment, No. 1995-0963 (April 8, 2002).[6]

II. Jurisdiction

We have federal question jurisdiction over plaintiffs' claims brought under 42 U.S.C. § 1983, and pendent jurisdiction over plaintiffs' state law trespass claims arising out of a common nucleus of operative facts. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1367(a). We will address below whether the District Court had subject matter jurisdiction over takings and trespass claims involving a railroad right of way for which the ICC has authorized unconditional abandonment.

Although the District Court dismissed this case without prejudice, this order is final and appealable because plaintiffs have elected to stand on their complaint. *See Welch v. Folsom*, 925 F.2d 666, 668 (3d Cir. 1991) ("If the plaintiff . . . elects to stand on the dismissed complaint, however, we have held that the order of dismissal [without prejudice] is final and appealable").

III. Discussion

The District Court held that it lacked jurisdiction over plaintiffs' trespass and constitutional claims based on interference with property rights. It adopted the Magistrate

[6] We are disturbed that none of the parties to this case notified us of the Pennsylvania Court of Common Pleas' April 8 ruling. We do note, however, that the state court's subsequent ruling does not preclude us from making an independent evaluation of the initial judgment of the District Court.

Judge's determination that the STB had exclusive and plenary jurisdiction to determine whether Conrail had abandoned its right of way over the Allegheny Secondary Track. This determination was based on a finding that the STB will retain jurisdiction unless and until it makes an initial determination that Conrail has fully abandoned the Allegheny Secondary Track.

Under the circumstances of this case, however, it is plain that the ICC's unconditional authorization of abandonment ended the federal agency's regulation of the Allegheny Secondary Track. Because the abandonment certificate contained no conditions permitting continued regulation by a federal agency, there is no need for the STB to determine whether it still has jurisdiction or whether Conrail has met all of its conditions and effectuated an abandonment sufficient to terminate the agency's jurisdiction. The ICC clearly indicated its intent to end federal regulation of the Allegheny Secondary Track. Thus, there is no jurisdictional bar to the District Court resolving a property dispute based on the effect of actions Conrail took after the ICC gave it carte blanche to cease rail service.

The fundamental misstep taken by the District Court was its failure to recognize the ICC's unusually limited role in the abandonment proceedings for the Allegheny Secondary Track. First, the statutory provision governing Conrail's abandonment of this track is § 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748. Section 308 limits the ICC's usual authority to impose abandonment conditions by providing expedited procedures for certain abandonment requests filed by Conrail. Second, under these expedited abandonment procedures, the ICC granted Conrail *unconditional* authority to

abandon its line. This unconditional abandonment terminated the agency's jurisdiction over the Allegheny Secondary Track. Third, the ICC was never asked to intervene and prevent abandonment by certifying an interim trail use under the National Trails Act, 16 U.S.C. § 1247(d). The record makes clear that the ICC's role has ceased. Thus, the question of ownership of the roadbed after abandonment is ripe for disposition under state property law.

A. The District Court failed to recognize that Conrail's abandonment was authorized under § 308(c).

The District Court's first error was its apparent failure to recognize that Conrail received approval to abandon its line under § 308(c), a statutory provision which substantially limits the ICC's involvement in abandonment proceedings. The District Court instead treated the ICC's order as a run-of-the-mill abandonment authorized under the Interstate Commerce Act. These run-of-the-mill proceedings, however, come under a different statutory provision which grants the ICC a more active role in abandonments than does § 308.

Although federal law did not initially subject railroad abandonments to the jurisdiction of the ICC, by 1920 Congress had ceded regulatory authority over railroad abandonments to it. *Hayfield Northern Railroad Company v. Chicago and North Western Transportation Company,* 467 U.S. 622, 628 (1984). The subsequent enactment of § 308 exempted certain railroad abandonments from the lengthier abandonment proceedings required under the Interstate Commerce Act, 49 U.S.C. § 10903-6. Section 308 provides a streamlined procedure for the ICC to process

applications to abandon railways and is limited to abandonment applications that are initiated by Conrail prior to November 1, 1985.[7]

Congress enacted § 308 in order to provide Conrail with "an unobstructed opportunity to become a solvent operation." *Consolidated Rail Corp. v. County of Monroe,* 558 F. Supp. 1387, 1389 (Spec. Ct. R.R.R.A. 1983). The ICC has stated that, in essence, "section 308 requires [it] to grant, *without examination*, any Conrail abandonment application unless an offer of financial assistance is timely filed." *See Conrail Abandonments Under NERSA,* 365 I.C.C. 472, 472-73 (November 25, 1981).[8] Thus, the abandonment proceedings established by § 308 contemplate limited agency involvement and virtually automatic approval of Conrail's request to abandon its line.

The District Court failed to consider § 308, and the limited nature of the ICC's involvement in abandonment proceedings thereunder, when it determined that the STB retained jurisdiction over the Allegheny Secondary Track. This is evident from the court's statement that the Court

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[7] Specifically, § 308 does not subject abandonments to the notice requirements and public convenience and necessity findings that apply to the more common abandonment proceedings under 49 U.S.C. § 10903. *See* 45 U.S.C. § 748(a) (application for certificates of abandonment under this section "shall not, except as specifically provided by this section, be subject to the provisions of chapter 109 of Title 47"). Moreover, abandonments under section 308(c), which are intiated from December 1, 1981 to November 1, 1985, are not subject to the liquidation provisions of 308(e).

[8] Although the ICC may delay § 308 abandonments under the interim use provisions of the National Trails Act, 16 U.S.C. § 1247(d), we explain below why the National Trails Act is inapplicable here.

of Appeals would have exclusive jurisdiction over the ICC's abandonment certificate under the Hobbs Act, 28 U.S.C. § 2342(5). Abandonment proceedings under § 308, however, may be appealed only to the Special Court, Regional Rail and Reorganization Act of 1973,[9] and not to the Court of Appeals which, under the Hobbs Act Court, would hear appeals of orders entered under the Interstate Commerce Act. 45 U.S.C. § 1105; *Edison Electric Institute v. ICC,* 765 F.2d 210, 215 (D.C. Cir. 1985). As explained below, the District Court's failure to recognize the proper statutory provision, which governed Conrail's abandonment, led it to an erroneous jurisdictional conclusion.

B. Unconditional authorization of abandonment, as Conrail obtained under § 308, will terminate the ICC's jurisdiction.

Failure to grasp the *unconditional* nature of the ICC's abandonment certificate under § 308 also led the District Court to apply the wrong jurisdictional analysis. In cases where the ICC has placed no conditions on a railroad abandonment, both the Supreme Court and this Court have noted that the ICC's decision to authorize an abandonment will bring its jurisdiction to an end. As the Supreme Court stated in *Hayfield*, 467 U.S. at 633, "unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission's *authorization* of an abandonment brings its regulatory mission to an

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[9] The Rules of the Special Court are set forth at 45 U.S.C. § 719. The Special Court was dissolved on January 17, 1997, and its jurisdiction and functions were assumed by the United States District Court for the District of Columbia, 45 U.S.C. § 719(b).

end." *Id.* (emphasis added). Likewise, we have noted the applicability of *Hayfield* in cases where the federal agency does not place any conditions on abandonment: "Unless the STB attaches post-abandonment conditions to a certificate of abandonment . . . the authorization of abandonment ends the Board's regulatory mission and its jurisdiction." *See Friends of Atglen-Susquehanna Trail, Inc. v. STB,* 252 F.3d 246, 262 (3d Cir. 2001).[10] Although the few reported proceedings regarding abandonments under § 308 do not address this rule, they offer no suggestion that a different rule should apply to an unconditional abandonment under § 308. Indeed, the expedited nature of a § 308 abandonment would argue strongly in favor of applying this "unconditional abandonment" rule to terminate the ICC's regulatory role in the case of a § 308 abandonment.

The District Court, however, relied on the general rule applied to the vast majority of railroad abandonments – which are *conditional* abandonments under the Interstate Commerce Act. The jurisdictional rule for unconditional abandonments differs from the general rule applied to conditional abandonments. When an abandonment is conditional, the ICC retains jurisdiction over a railroad right of way until it has been abandoned pursuant to the conditions established by the federal agency. *See Preseault v. ICC,* 494 U.S. 1, 5 n.3 (1990); *Hayfield,* 467 U.S. at 633; *see also Birt v. STB,* 90 F.3d 580, 589 (D.C. Cir. 1996). In

[10] The D.C. Circuit has taken this rule a step further and found abandonment based on a *conditional* ICC order, where "nothing in the condition recites a limitation on the ability of CSX to effect an abandonment." *Fritsch v. ICC,* 59 F.3d 248, 253 (D.C. Cir. 1995).

such cases, the agency also retains exclusive, plenary jurisdiction to determine *whether there has been an abandonment* sufficient to terminate its jurisdiction. *See Friends of the Atglen-Susquehanna Trail,* 252 F.3d at 262 (rejecting argument that rail line had been abandoned "because there has been no STB finding that Norfolk consummated abandonment of the rail line").[11] Because Conrail's abandonment was authorized without conditions under the provisions of § 308, the District Court erred in following the general rule to conclude that the STB retained exclusive jurisdiction. As explained above, the ICC's unconditional abandonment order makes clear that there is no basis for continued federal regulation of the Allegheny Secondary Track.

Moreover, because the District Court failed to recognize that the ICC's unconditional abandonment certificate ended the agency's jurisdiction, it also failed to note that any property disputes regarding the railroad's right of way may be resolved according to state property law: "When abandonment approval is given . . . state property law

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[11] Historically, the STB determined whether an abandonment was consummated by evaluating the carrier's objective intent to cease permanently or indefinitely all transportation service on the line. *Id.* This test leaves a great deal of uncertainty as to the rail line's status, however. Since 1997, the STB has taken steps to alleviate this problem by renewing a requirement that railroads file with the agency a letter confirming consummation of abandonment. *Becker v. Surface Transportation Board,* 132 F.3d 60, 61 n.2 (D.C. Cir. 1997) (noting that the STB recently amended its regulations to require that railroads file a notice of consummation with the STB); *see also Consolidated Rail Corp. v. Surface Transportation Board,* 93 F.3d 793 (D.C. Cir. 1996) (discussing pre-1984 requirement that railroads file with the ICC a letter confirming consummation of abandonment).

returns to the foreground and controls the disposition of the land." *National Assoc. of Reversionary Property Owners v. STB,* 158 F.3d 135, 137 (D.C. Cir. 1998). This conclusion has been supported by the Special Court which has noted that another court would not interfere with its exclusive jurisdiction by resolving property disputes of this ilk: If "some adjacent landowner to a railroad right of way brought a complaint for trespass arising out of Conrail's dismantling process, that lawsuit would not fall within the jurisdiction of the Special Court." *Consolidated Rail Corp. v. County of Monroe,* 558 F. Supp. 1387, 1390 n.8 (Spec. Ct. R.R.R.A. March 31, 1983).

Thus, we conclude that in this case the District Court is free to determine, as a matter of state law, whether Conrail has abandoned its right of way and whether its interest in the right of way has reverted to plaintiffs. Resolution of this question will not interfere with the STB's exclusive jurisdiction to authorize abandonments because the federal agency has already granted unconditional authority for Conrail to terminate service.

C. The AVLT has not invoked the STB's jurisdiction under the provisions of the National Trail Act.

Our jurisdictional analysis is not altered by defendants' claim that the AVLT prevented abandonment by converting the railroad right of way to a trail under the provisions of the National Trails Act, 16 U.S.C. § 1247(d). The National Trails Act is designed to prevent an interest in a railroad right of way from reverting under state law when the right of way is used as a trail after the railroad discontinues service. *Preseault,* 494 U.S. at 8. Thus, if the STB certifies an interim trail use, and an agreed trail use

is negotiated in a timely manner, the STB will maintain federal jurisdiction over the right of way. The National Trail Act's provisions are applicable to abandonment proceedings under § 308. *See Rail Abandonments – Use of Right of Ways as Trails,* 2 I.C.C.2d 591, 613 (April 16, 1986).

In order to preserve the right of way, however, the STB requires a sponsor wishing to maintain a trail to file certain documentation describing the site, indicating the user's willingness to assume full responsibility for management, legal liability, and taxes, and acknowledging the user's continuing obligation to meet its responsibilities. 49 C.F.R. § 1152.29(a); see also *Citizens Against Rails-to-Trails v. STB,* 267 F.3d 1144, 1150 (D.C. Cir. 2001). If the abandonment is authorized under § 308, the railroad must agree to negotiate a rail banking agreement before the STB will issue a certificate of interim use (or CITU) to prevent the right of way from reverting under state property law. 49 C.F.R. § 1152.29(c)(1) (discussing requirements applicable to NERSA abandonments, which include abandonments under § 308).[12] The AVLT never met these requirements by filing with the ICC or STB, and Conrail refused to join the AVLT in filing for railbanking with the ICC. Thus, there is no basis for arguing that the STB has jurisdiction over this matter under the provisions of the National Trails Act.

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[12] Although there is authority supporting the ICC's ability to authorize interim use based on a late-filed application, the ICC cannot take such action after its jurisdiction over a railway has ended, as is the case here. *see Illinois Central Railroad Co.-Abandonment-In Dewitt and Piatt Counties,* IL, 5 I.C.C. 2d 1054, 1060-61 (1989).

Nor does the District Court's reliance on the Eighth Circuit's opinion in *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654 (8th Cir. 1996), support a contrary decision. *Grantwood* involved an abandonment under the Interstate Commerce Act, 49 U.S.C.A. §§ 10903-04, in which one party filed a request for interim use during abandonment proceedings before the ICC. *Id.* at 656. There, the ICC granted a notice of interim use (or NITU),[13] and the parties reached a trail use agreement within the time provided by the ICC. *Id.* A subsequent quiet title action raised the question of whether the trail use agreement precluded abandonment and reversion to the owners of the underlying property.

The Eighth Circuit Court of Appeals held that the suit amounted to a collateral attack on the ICC's allowance for an interim trail use and that the ICC's authorization of such trail use precluded a finding that the right of way had been abandoned under state law. *Grantwood,* 95 F.3d at 657-58. In this case, however, regulatory requirements for an interim trail use have not been met. A request for interim trail use has never been filed with the ICC or the STB and neither agency has authorized an interim use. 49 C.F.R. § 1152.29(a). Nor could the AVLT meet these requirements because Conrail did not agree to join the AVLT in filing with the ICC for rail banking. 49 C.F.R. § 1152.29(c)(1). Thus, the ICC has not authorized the

[13] A NITU is the type of interim trail use permit that the ICC uses in a proceeding involving the exemption of a route from ICC regulation; in other proceedings, including abandonments under section 308, the agency will issue a Certificate of Interim Trail Use, or CITU. *See, e.g.*, 49 C.F.R. § 1152.29.

AVLT to conduct any trail use that would preclude a finding of abandonment of the Allegheny Secondary Track under state law. *Grantwood* is inapplicable.

IV. CONCLUSION

As explained above, it is clear that the ICC's regulatory role over the Allegheny Secondary Track has ended and that there is no basis for continued agency regulation of this railroad right of way. Thus, there is no jurisdictional impediment to the District Court's adjudication of plaintiffs' property dispute. We will reverse the District Court's October 1, 2001, Order dismissing this case without prejudice and remand it for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Supreme Court, U.S.
FILED
JUL 9 _ 2003
OFFICE OF THE CLERK

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No. 02-1792

IN THE

Supreme Court of the United States

CARL E. JONES, KATHRYN L. JONES, LARRY TREADWAY, KASSIE TREADWAY, DAVID C. JONES, SYLVIA J. JONES, JERRY PURCELL, MARGIE PURCELL,

Petitioners,

v.

BUFFALO TOWNSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF IN OPPOSITION

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Respondent, Buffalo Township, requests that this Court deny the Petition for Writ of Certiorari filed by Carl E. Jones, et al. seeking review of the decision of the Supreme Court of Pennsylvania entered in this case on December 31, 2002.

COUNTERSTATEMENT OF THE CASE

Buffalo Township is a Pennsylvania second-class township located in the southeastern corner of Butler County, approximately 30 miles northeast of Pittsburgh. In the 1860s, the Western Pennsylvania Railroad Company (which subsequently became a part of the Consolidated Rail Corporation (hereinafter "Conrail")), obtained deeds, rights-of-way, and easements over privately owned property to construct a railroad. The railroad acquired these interests in various manners, sometimes through condemnation, sometimes through fee simple deeds, and sometimes through right-of-way agreements. The line in question is 20.2 miles long and runs from Freeport, Armstrong County (near Buffalo Township) to Butler, Butler County (hereinafter "the Butler Line").

In the mid 1980's, Conrail determined that the Butler Line was no longer profitable and began discussions with Buffalo Township officials concerning conversion of the line into a "rails to trails" facility. In connection with these discussions, Conrail undertook the formal process of seeking Interstate Commerce Commission (hereinafter "ICC") approval to discontinue service on the line. Buffalo Township filed a request for interim trail use pursuant to 49 C.F.R. § 1152.29(a). After consulting with Conrail and numerous agencies of the Pennsylvania government, Buffalo Township officials concluded that it was not necessary to engage in this expensive process in order to establish a trail, and withdrew its request for interim trail use.

In the spring of 1990, in accordance with its plan with Conrail, Buffalo Township had a salvage company, B. Sykes Ltd., purchase the rails and ties and obtain a deed from Conrail. B. Sykes Ltd. then deeded the property directly to Buffalo Township while continuing to remove the rails and ties over the next three years. Buffalo Township then assumed all financial, legal, and managerial responsibility for the corridor.

In both the deed from Conrail to B. Sykes Ltd., and the deed from B. Sykes Ltd. to Buffalo Township, Conrail reserved the right to re-enter the land for the purpose of conducting future railroad operations. As a result, Buffalo Township's responsibility for the corridor is subject to Conrail's right to reactivate railroad service.

The Petitioners, Carl E. Jones, et al., who own land bordering the corridor, erected blockades to keep the public from using the trail. Buffalo Township sought an injunction. At trial, Buffalo Township presented the deeds to the property and various types of evidence concerning the arrangements made with Conrail, Buffalo Township, neighboring townships, and representatives of various Pennsylvania state agencies. Petitioners Jones et al. did not present evidence pertaining to the type of title obtained by them, and failed to put into evidence records pertaining to their particular chains of title.

The Court of Common Pleas of Butler County, sitting in equity, issued an injunction to prevent the Petitioners from interfering with the use of the trail by Buffalo Township and the general public. The Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court affirmed the findings of the trial court. The opinions of all these Courts agree that when Buffalo Township agreed to take all financial, legal, and managerial responsibility for the trail and Conrail reserved the

right to re-activate railroad service if the need ever arose, these parties complied with the requirements of the National Trails Systems Act and Pennsylvania's Rails to Trails Act. They also found that there could be no common law "abandonment" of an interest in real estate, under Pennsylvania state law, given the factual findings of the trial court and the lack of evidence of abandonment.

REASONS FOR DENYING THE PETITION

SUMMARY

Nothing in the Pennsylvania Supreme Court decision conflicts with any decision of the United States Supreme Court or any other Court of Appeals. The Petition for Writ of Certiorari cites no United States Supreme Court cases. The Third Circuit Court of Appeals case referenced in the Petitioners' Reasons for Granting the Petition, *Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2003), specifically concludes that considerations of abandonment and reversion of rights-of-way are to be determined through application of Pennsylvania law. *Lucas* neither interprets a federal statute nor conflicts with any decision from any other Circuit.

This Court addressed issues concerning the National Trails Systems Act in *Presault v. Interstate Commerce Commission*, 494 U.S. 1 (1990). *Presault* found that the National Trails Systems Act was constitutional, thus preventing property interests from reverting under state law.

The Pennsylvania Supreme Court has interpreted the National Trails Systems Act correctly and consistent with opinions from the ICC. Implementing the National Trails Systems Act, the ICC has opined that under its own

regulations, a notice or certificate of interim trail use is not a prerequisite to the establishment of a trail. *Southern Pacific Transportation Co., Exemption*, 1991 WL 108272 (I.C.C. 1991).

This case does not have to involve federal issues. Pennsylvania courts have jurisdiction to determine if real estate has been abandoned. Pennsylvania also has its own Rails to Trails Act, 32 Pa. Cons. Stat. § 5611, *et seq.*, that allows for rail banking of railroad corridors, preventing reversion of property interest. Buffalo Township complied with this Act as well. The Pennsylvania Supreme Court had adequate, independent state law grounds for its decision.

I. Congress Enacted The National Trails Systems Act To Facilitate, Not To Impede, The Preservation Of Transportation Corridors

Congress enacted the National Trails Systems Act to curtail the steady loss of transportation corridors resulting from diminishing railroad use. Congress recognized that the law could serve a dual purpose by preserving these corridors for future transportation needs and by providing current public recreational use. Congress passed Section 1247(d) to establish guidelines to help facilitate the creation of recreational trails, not to create an obstacle to a party who seeks to do so.

The United States Supreme Court, in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), held that Section 1247(d) validly prevents a right-of-way from reverting when a formal declaration of trail use is entered by the ICC. The ICC, however, has stated that there need not be a formal declaration of interim trail use for a property to be

used as a trail. *Southern Pacific Trans. Co., Exemption*, 1991 WL 108272 (I.C.C. 1991). Petitioners would have the Court believe that the failure to obtain a declaration of interim trail use constitutes a common law abandonment of a property interest. However, Section 1247(d) states that the ICC "shall not permit abandonment or discontinuance inconsistent or disruptive of [use as a trail]." The Ninth Circuit Court of Appeals has held that, "[t]he Commission's voluntary interpretation is consistent with the plain language of the statute. It achieves the primary objective of the Amendment, i.e., precluding reversions, and it advances the general objectives of the Trails Act." *Washington State Dep't of Game v. Interstate Commerce Comm'n*, 829 F.2d 877 (9th Cir. 1987).

The ICC has no discretion to override the clear congressional mandate of the National Trails Systems Act. Its ministerial function prevents the abandonment of a right-of-way from being consummated if the railroad and trail sponsors enter into a voluntary agreement and the sponsor agrees to accept financial responsibility. *Citizens Against Rails to Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1153 (D.C. Cir. 2001). Buffalo Township met the ICC requirements by accepting full responsibility of the management of, as well as potential liability for, the trail.

Petitioners confuse abandonment proceedings before the ICC, which are for the purpose of discontinuing the use of the line as a railroad, with actual abandonment of a property interest. While the ICC has jurisdiction to determine if a railroad has the right to discontinue service, it has no jurisdiction to determine whether a real interest in property has been abandoned. State law controls reversionary rights. *Preseault*, 494 U.S. 1 (1990). The Pennsylvania Supreme Court has spoken on this issue, and the United States Supreme Court should not be used to overturn a state court's application of a state's common law.

There is no conflict between the Pennsylvania Supreme Court's opinion and any federal case. All courts addressing this question agree that Pennsylvania law controls the issue of abandonment and the application of the Pennsylvania Rails to Trails statute.

II. The Ruling By The Supreme Court Of Pennsylvania In The Present Case Is In Accord With Circuit Court Rulings And State Law

Petitioners improperly included in their appendix to the Petition for a Writ of Certiorari a copy of *Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2003). This case is not inconsistent with the decision of the Pennsylvania Supreme Court. The Third Circuit simply remanded the proceedings to the District Court for a determination, applying state law, as to whether or not property had been abandoned.

The terms specifically set forth in the Pennsylvania Rails to Trails Act make it clear why the Petitioners' arguments of property abandonment have no basis in law. The Pennsylvania Rails to Trails Act defines "available railroad right-of-way" as "any railroad right-of-way that is proposed *or approved for* abandonment before the Interstate Commerce Commission, the Public Utility Commission, or other governing agency with jurisdiction in the matter." 32 Pa. Cons. Stat. § 5612 (2002) (Emphasis added). Thus actual approval of abandonment of the rail line by the ICC does not preclude rail banking under the Pennsylvania Rails to Trails Act. In fact, Pennsylvania law makes eventual ICC abandonment a prerequisite to a corridor being available for the State Rails to Trails program.

The Superior Court of Pennsylvania has held that, to show an abandonment,

> the moving party must establish that the dominant tenement had an intent to abandon the easement coupled with either 1) adverse possession by the owner of the servient tenement; 2) obstruction of the right-of-way by the dominant tenement that is inconsistent with its further enjoyment; or 3) affirmative acts by the owners of the dominant tenements that render the use of the right-of-way impossible.

Daddona v. Thorpe, 749 A.2d 1012 (Pa. Super. Ct. 2000) (citing *Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992)). Petitioners have proven neither Conrail's intent to abandon its property interest, nor any of the three criteria necessary to demonstrate an abandonment under Pennsylvania law.

The trial court in the present case held that Conrail had not actually abandoned its right of way. But even if Conrail had, other provisions of the Pennsylvania Rails to Trails Act come into play. Section 5614 allows for municipalities to acquire title to railroad beds and authorizes the Pennsylvania Department of Environmental Protection ("DEP") to participate in ICC proceedings. The State Act's specific provision of DEP involvement in rails to trails projects is important in the present case because the DEP was actually involved in the negotiations with Conrail, Buffalo Township, and the ICC. The fact that Conrail engaged in these negotiations, while at the same time reserving rights in the deed, evidences a clear intent to retain property rights, not to abandon them.

Because of the public nature of the property rights in transportation corridors, it is necessary for the Commonwealth to be involved in any abandonment proceedings of a public railroad right-of-way. Traditionally, consent from the Commonwealth was obtained from the Pennsylvania Public Utility Commission ("PUC") through a proceeding to abolish the rail service. *Lacy v. E. Broad Top R.R. & Coal Co.*, 77 A.2d 706 (Pa. Super. Ct. 1951). Although the PUC's role has been reduced by increased involvement of the ICC and the Surface Transportation Board, Pennsylvania law still requires intervention in the "abandonment" process.

The Pennsylvania Rails to Trails Act requires PUC evaluation of recreational trails before it can permit abandonment of a railroad bed even though the ICC has permitted abandonment of service on the line. *CSX Transp. Corp. v. Pub. Util. Comm'n*, 558 A.2d 902 (Pa. Commw. Ct. 1989). The Pennsylvania Rails to Trails Act also requires notification to the DEP and the Pennsylvania Department of Transportation before abandonment can occur. 66 Pa. Cons. Stat. § 2702 requires that the PUC approve removal of tracks at highway crossings. 66 Pa. Cons. Stat. § 2709 provides that a public utility in the railroad business cannot dispose of real property used as a railroad bed without notifying the Department of Transportation, the Game Commission, the Fish and Boat Commission, and the Department of Environmental Resources. Respondents have failed to prove that the PUC approved the abandonment of any property interest. They have, therefore, failed to meet their burden. Even if this Court were to consider review of a state court's interpretation of state law, there would be no logic in selecting the present case for such a review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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ED
JUL 2 2 2003

No. 02-1792

In The
Supreme Court of the United States

CARL E. JONES, KATHRYN L. JONES,
LARRY TREADWAY, KASSIE TREADWAY,
DAVID C. JONES, SYLVIA J. JONES,
JERRY PURCELL, MARGIE PURCELL,

Petitioners,

v.

BUFFALO TOWNSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AND MOTION FOR LEAVE TO FILE BRIEF *NUNC PRO TUNC* AND BRIEF OF *AMICUS CURIAE* PENNSYLVANIA LANDOWNERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amicus Curiae Pennsylvania Landowners Association ("PLA") respectfully moves this Court for leave to file a brief in support of the Petition for a Writ of Certiorari in this case.

1. Counsel of record for PLA attempted to obtain consent of all parties in this case to file an *amicus curiae* brief by timely making a request to counsels of record.

2. Petitioners' counsel, William Claney Smith, Esquire has consented to the filing of PLA's *amicus curiae* brief.

3. Respondent's counsel, Lawrence Paul Lutz, Esquire will not consent to the filing of PLA's *amicus curiae* brief.

4. PLA has a strong interest in this case and believes it can aid the Court in its decision as set forth in the attached brief.

WHEREFORE, PLA respectfully requests that this Court grant its Motion for Leave to File an *Amicus Curiae* Brief in support of the Petition for Writ of Certiorari filed in this case.

Respectfully submitted,

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Counsel for Pennsylvania Landowners Association

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF *NUNC PRO TUNC*

Amicus Curiae Pennsylvania Landowners Association ("PLA") respectfully moves this Court for leave to file *nunc pro tunc* a brief in support of the Petition for a Writ of Certiorari in this case.

1. The Petition for Writ of Certiorari in the case at issue was placed on the docket on June 11, 2003.

2. Pursuant to Rule 37.2(a) of the Supreme Court's Rules, an *amicus curiae* brief must be filed within the time allotted for the filing of a brief in opposition or within thirty days after the case is placed on the docket. Supreme Court Rule 15.3.

3. The *amicus curiae* brief and the brief in opposition were required to be filed by July 14, 2003.

4. Counsel for PLA reviewed the United States Supreme Court's computerized docket sheet for the case at issue and mistakenly apprehended the date June 23, 2003 in brackets underneath the computer screen entitled "Docket for 02-1792" and erroneously determined that the Petition for Writ of Certiorari in this case was docketed on June 23, 2003. Thus, counsel for PLA believed that the *amicus curiae* brief was not due for filing until thirty days thereafter, or July 23, 2003.

5. As counsel for PLA was preparing to file the attached *amicus curiae* brief, counsel learned that the Petition for Writ of Certiorari was docketed on June 11, 2003.

6. Counsel for PLA respectfully prays that the *amicus curiae* will not be foreclosed from filing its brief as a result of misapprehension of the online docket sheet counsel consulted in this case.

WHEREFORE, counsel for PLA respectfully requests that that this Court grant its Motion for Leave to File an *Amicus Curiae* Brief *Nunc Pro Tunc*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Pennsylvania Landowners Association ("PLA") is a statewide, non-profit corporation and volunteer organization of individuals whose livelihoods are dependent on the use and development of privately owned land in the Commonwealth. PLA's objective is to advance the interests of private landowners, particularly those individuals who have limited resources in comparison to those of state, local and federal agencies and powerful, privately funded, non-governmental organizations which are frequently arrayed against landowners in matters involving environmental and land-use regulation affecting private property rights.

PLA is greatly concerned about the proliferation of involuntary rails-to-trails conversions and other legislative and regulatory initiatives which can indefinitely suspend, if not entirely destroy their members' reversionary interests in abandoned railroad rights-of-way property.

Smaller landowners don't have the resources to go to court and assert their constitutional rights. Simply stated, small landowners can be priced out of the takings and rails-to-trails litigation market and any confusion in that law exacerbates the difficulties encountered by small landowners whose property rights are affected by trail conversions.

Abandoned and active railroad rights-of-way criss-cross Pennsylvania and burden hundreds of thousands of

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for the *amicus curiae* states that counsel and the *amicus curiae* were the sole authors of the Brief. No person or entity, other than the *amicus curiae*, made any monetary contribution to the preparation or submission of this Brief.

acres of private land. A large percentage of these rights-of-way were operated and subsequently abandoned by Conrail in circumstances virtually identical to those involved in this case and in *Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2002).

Pennsylvania is located within the jurisdiction of the Court of Appeals for the Third Circuit. PLA believes that the decision of the Supreme Court of Pennsylvania involved here, unless reversed, will cause irreconcilable confusion and present directly conflicting precedent to litigants in any court sitting in Pennsylvania in any litigation relating to the Rails-to-Trails Act.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court in the case at issue has violated the Supremacy Clause by holding that a prospective recreational trail user seeking to use a former railroad right-of-way need not fully comply with federal regulations promulgated pursuant to the Rails-to-Trails Act, which holding is directly in conflict with a Third Circuit Court of Appeals' controlling decision requiring full compliance with the regulations before abandonment of the right-of-way and reversionary property interests are suspended, a question of federal law. The state court's decision will cause confusion and uncertainty both for entities seeking use of abandoned railroad rights-of-way under the federal Act and for underlying property owners with reversionary interests.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT'S DECISION THAT PROPOSED INTERIM TRAIL USERS NEED NOT COMPLY WITH FEDERAL REGULATIONS IMPLEMENTING THE NATIONAL TRAILS SYSTEM ACT IS IN DIRECT CONFLICT WITH THE LAW OF THE THIRD CIRCUIT COURT OF APPEALS IN VIOLATION OF THE SUPREMACY CLAUSE

Congress enacted the National Trails System Act, 16 U.S.C. § 1241 *et seq.*, to permit, under carefully prescribed conditions, the interim use as recreational trails of certain rights-of-way formerly used by railroads, while preserving those rights-of-way for the railroads' possible future use (hereinafter, "Rails-to-Trails Act"). *Preseault v. I.C.C.*, 110 S. Ct. 914, 916 (1990). Under Section 8(d) of the Rails-to-Trails Act, 16 U.S.C. § 1247(d), certain entities such as a state, municipality, or private group may seek to use a railroad's right-of-way for interim trail use if that entity agrees to assume legal and financial responsibility for the right-of-way property. *Preseault*, 110 S. Ct. at 916. If the prescribed conditions are met and the interim trail use is approved, the underlying property owner's reversionary interests are destroyed and prevented from vesting immediately as they would in the majority of contexts. *Preseault*, 110 S. Ct. at 919.

The Interstate Commerce Commission ("ICC") originally was authorized to implement the Rails-to-Trails Act.[2]

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[2] The Surface Transportation Board ("STB") assumed the ICC's responsibilities to regulate railroads in 1996. 49 U.S.C. § 701. This Brief will refer to the ICC, rather than the STB, because the ICC was the relevant entity in the case before the Court.

The ICC's regulations promulgated under the Rails-to-Trails Act require that a prospective interim trail user, in order to preserve the railroad right-of-way for recreational trail use, file with the ICC formal documentation describing the proposed site, indicating the user's willingness to assume full responsibility for management, legal liability, and taxes regarding the site, and acknowledging the user's continuing obligation to meet the aforementioned responsibilities. 49 C.F.R. § 1152.29(a).

In *Lucas*, the United States Court of Appeals for the Third Circuit determined that a proposed interim trail user must file the documents required in the ICC's regulations under the Rails-to-Trails Act to prevent lawful abandonment and reversion of the right-of-way to the owners of the underlying property. 319 F.3d at 604. The facts of the case in *Lucas* are remarkably similar to those in the case at issue. In both cases, Conrail notified the ICC on October 31, 1985, that it intended to abandon a railroad right-of-way pursuant to Section 308(c) of the Regional Rail Reorganization Act, 45 U.S.C. § 748(c).[3] *Id.* at 599; *Buffalo Township v. Jones*, 813 A.2d 659, 661 (Pa. 2002). In both cases, Conrail filed an application with the ICC for approval of abandonment under Section 308. *Id.* In both cases, the ICC issued an unconditional authorization to Conrail to abandon the right-of-way under Section 308. *Id.* In both cases, rail service had been long discontinued by Conrail and provisions had been made for the removal of all railroad track and appurtenant materials. *Lucas*, 319 F.3d at 599; *Buffalo Township*, 813 A.2d at 662.

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[3] Section 308 applies specifically to abandonment applications filed by Conrail prior to November 1, 1985 and provides a streamlined procedure for Conrail to abandon its unprofitable railroad rights-of-way. 45 U.S.C. § 748.

Moreover, in both the case at issue and in *Lucas*, after the ICC authorized abandonment of the railroad rights-of-way, Conrail sold the rights-of-way interests to entities wishing to use them for recreational trail purposes. *Lucas*, 319 F.3d at 599; *Buffalo Township*, 813 A.2d at 662. In both cases, those entities failed utterly to comply with the ICC regulations promulgated pursuant to the Rails-to-Trails Act. 49 C.F.R. § 1152.29(a). Indeed in the case at issue, a request for interim trail use was filed, but later withdrawn. *Buffalo Township*, 813 A.2d at 662. In *Lucas*, no documentation whatsoever was filed with the ICC to even qualify under the Rails-to-Trails Act to request a suspension of abandonment of the railroad right-of-way. 319 F.3d at 604.

Despite the similarities between the two cases, however, the Pennsylvania Supreme Court made a ruling in complete conflict with the Third Circuit's decision regarding the need for proposed interim trail users to comply with the ICC regulations under the Rails-to-Trails Act. The Court of Appeals in *Lucas* decided that the entity proposing recreational trail use in that case had not invoked the jurisdiction of the ICC because it had not complied with the applicable regulations in failing, among other things, to file the required documents. 319 F.3d at 604.

In stark contrast, the Pennsylvania Supreme Court, in *Buffalo Township*, held that the proposed trail user in that case did not need to comply fully with the requirements in the regulations under the Rails-to-Trails Act. 813 A.2d at 653. The court determined that, because the ICC's involvement in trail conversions is "merely procedural," a proposed trail user is not required to file an application with the ICC to suspend abandonment of the railroad right-of-way and reversion of the interest of the underlying property owner. *Id.* at 654. The Pennsylvania Supreme

Court made its decision despite having had its attention specifically directed to the Third Circuit's contrary decision in *Lucas*.

By holding that federal regulations promulgated pursuant to a federal statute need not be complied with in contradiction of a controlling federal appeals court decision, the Pennsylvania Supreme Court has violated the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2. *See also Key v. Wise*, 102 S. Ct. 682, 685 (1981). The impact of this violation of the Supremacy Clause will be to create confusion in the law regarding compliance with the federal regulations under the Rails-to-Trails Act. Proposed trail users that examine Pennsylvania law will be informed that they need not abide by the ICC regulations, while those that examine the law of the federal appellate court sitting in Pennsylvania will be told that they must comply fully with those same regulations. Certainly, a proposed trail user will "shop" for a Pennsylvania court if possible because the user's compliance burden is significantly lessened in that court. Finally, individuals holding reversionary interests in railroad rights-of-way cannot know with any certainty when or if their reversionary property interests will vest.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted, the Pennsylvania Supreme Court's holding that federal regulations under the Rails-to-Trails Act need not be complied with in contradiction of the decision of the Third Circuit Court of Appeals should be reversed as violative of the Supremacy Clause,

and all other relief based upon Petitioners' arguments should be granted.

Respectfully submitted,

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